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No. ———

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

AMERICAN TRUCKING ASSOCIATIONS, INC., *et al.*,
Petitioners,

v.

UNITED STATES OF AMERICA and
INTERSTATE COMMERCE COMMISSION,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

The Interstate Commerce Act requires a motor carrier which transports property for compensation to obtain operating authority from the Interstate Commerce Commission and comply with various statutory requirements. A shipper which transports its own freight is not subject to ICC regulation. When a shipper leases both equipment and drivers from a single-source to transport its own freight, the Commission must determine if the transportation is for-hire carriage subject to regulation or exempt private carriage. With this background, the following questions are presented:

1. Whether the Eleventh Circuit erred in finding that the new test established by the ICC for determining whether a leasing arrangement is regulated for-hire motor carriage or exempt private motor carriage is consistent with the Motor Carrier Act of 1980?

2. Whether the Eleventh Circuit, contrary to the Fifth Circuit decision in *Central Forwarding*, erroneously concluded that the National Transportation Policy is an independent source of power for ICC action designed to enhance the economic position of unregulated entities to the detriment of regulated carriers?

3. Whether the Eleventh Circuit misinterpreted this Court's decision in *Drum* to permit the ICC to reject the requirement that the characteristic burdens of transportation, including an employment relationship, be present if a single-source leasing arrangement is to qualify as *bona fide* unregulated private carriage?

THE PARTIES

The parties to the proceeding before the Eleventh Circuit are listed below.

Petitioners and intervenors supporting petitioners were as follows:

American Movers Conference,
American Trucking Associations, Inc.,
Bowman Transportation, Inc.,
Charter Express, Inc.,
Common Carrier Conference—Irregular Route (now "Interstate Carriers Conference"),
Frank Bros. Trucking Co.,
Hedrick Associates, Inc.,
Import Dealers Service Corporation,
International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America,
J. H. Rose Truck Line, Inc.,
National Association of Regulatory Utility Commissioners,
National Automobile Transporters Association,
National Tank Truck Carriers, Inc.,
North Alabama Transportation, Inc.,
Osborne Truck Line, Inc.,
Port Norris Express Co., Inc.,
Regular Common Carrier Conference, Inc.,
Ryder Truck Lines, Inc.,
Senn Trucking Company,
Southern Intermodal Logistics, Inc.,
Specialized Carriers and Rigging Association, and
Steel Carriers' Tariff Association, Inc.

Respondents and intervenors supporting respondents were as follows:

United States of America,
Interstate Commerce Commission,
National-American Wholesale Grocers' Association,
National Industrial Traffic League (now "National Industrial Transportation League"),
Private Carrier Conference, Inc., and
Private Truck Council of America

Petitioners American Movers Conference, Interstate Carriers Conference, National Automobile Transporters Association, National Tank Truck Carriers, Inc., Regular Common Carrier Conference, Inc., and Specialized Carriers and Rigging Association are affiliated conferences of the American Trucking Associations, Inc. (ATA). The intervening-respondent Private Carrier Conference, Inc., is also an affiliated conference of ATA. Ryder Truck Lines, Inc., is a wholly-owned subsidiary of IU International Corporation. Through IU, Ryder Truck Lines, Inc., is affiliated to the numerous companies listed in Appendix G. Petitioners herein are not aware of any other corporate affiliations of the parties.

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The American Trucking Associations, Inc., Interstate Carriers Conference, National Automobile Transporters Association, National Tank Truck Carriers, Inc., Regular Common Carrier Conference, Inc., Specialized Carriers and Rigging Association, Steel Carriers' Tariff Association, Inc., and International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America, respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The opinion of the Interstate Commerce Commission, attached as Appendix A, is reported at 132 M.C.C. 756 (1982). The opinion of the United States Court of Ap-

peals for the Eleventh Circuit, attached as Appendix B, is reported at 716 F.2d 1369 (1983).

JURISDICTION

The decision of the Eleventh Circuit was entered on October 11, 1983. Petitioners moved the court on October 26, 1983 for a stay of the mandate pending the filing of a petition for writ of certiorari. By order dated November 17, 1983, the Eleventh Circuit granted the motion and stayed its mandate to and including December 5, 1983 (Appendix C). By subsequent order, the court further stayed its mandate to and including December 7, 1983 (Appendix D). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES

The relevant statutory provisions are set forth in Appendix E.

STATEMENT OF THE CASE

After notice and comment, the Interstate Commerce Commission (ICC or Commission) on February 17, 1982 served its decision in Ex Parte No. MC-122 (Sub-No. 2), *Lease of Equipment and Drivers to Private Carriers*, 132 M.C.C. 756 (1982). This decision rejected the long-standing "control and substance" test applied by the ICC and by federal courts for determining whether a lease of both of the traditional instrumentalities of transportation—vehicle and driver—from a single source constitutes for-hire carriage (subject to ICC regulation) or private carriage (exempt from such regulation). Under the "control and substance" test, a shipper which leases equipment and drivers from a single source is required to (1) control the transportation and (2) assume in substance the characteristic burdens of transportation, in order to qualify as an exempt private carrier. A single-source leasing arrangement has been presumed to con-

stitute unlawful for-hire carriage, and the burden to rebut has rested upon the parties to the lease.[1]

The first prong, the control test, requires that the shipper direct, dominate, and control the transportation. The second prong, the burdens test, requires that the shipper bear the *financial* risk for the operation of the vehicle and the carriage of its goods. This two-pronged test was established by this Court in *United States* v. *Drum*, 368 U.S. 370 (1962).

In lieu of the control and substance test, the ICC has substituted a so-called "control and responsibility" test, under which leasing arrangements are, as a practical matter, presumed to be exempt private carriage. Under this test, a shipper's right to lease transportation no longer requires that the lessor's driver enter into an employee relationship. Moreover, the new test defines the characteristic burdens of transportation as the burdens of management and responsibility to the public rather than the customary financial burdens associated with the maintenance, depreciation and risk of equipment nonutilization. The avowed purpose of this concededly more lenient test is to improve the efficiency of exempt private carriage and to give unregulated owner-operators an additional source of revenue. Appendix A at 21a.

Petitions for review of the ICC's decision were filed with the Eleventh Circuit in No. 82-5247 on February 26, 1982, and in No. 82-8133 on March 4, 1982, pursuant to 28 U.S.C. §§ 2342(5) and 2344.[2] The court consolidated the two docketed cases.

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[1] The single-source lessor may be (a) an owner-operator, (b) a "fleet" owner, or (c) a commercial leasing company, such as Hertz or Leaseway Transportation (*see* Appendix F).

[2] Ryder was the petitioner below in No. 82-5247; ATA and all others petitioners herein were petitioners below in No. 82-8133. Petitioners and intervening petitioners were regulated motor carriers, associations of such carriers, National Association of Regu-

Petitioners presented five main arguments to the court. First, the ICC's decision is a rule rather than a policy statement. Second, the agency's decision is irrational because it is inconsistent with and undermines the statutory scheme for the regulation of transportation, including the changes enacted in the Motor Carrier Act of 1980 (MCA). Third, the decision conflicts with this Court's decision in *Drum*, and decisions of the ICC and other federal courts. Fourth, the agency improperly relied upon the National Transportation Policy (NTP), 49 U.S.C. § 10101, as a mandate to improve the competitive capabilities of non-regulated transportation entities vis-a-vis regulated motor carriers. Finally, the ICC failed to abide by the requirements of the National Environmental Policy Act and the Energy Policy and Conservation Act.

The Eleventh Circuit rejected each of the petitioners' arguments. It found the decision to be a policy statement rather than a rule. The Eleventh Circuit concluded that the ICC's determinations on the energy and environmental impact comported with the statutes and regulations. It concluded that the decision was "not inconsistent with the provisions of the Motor Carrier Act" and found that the Commission's assertion of changes in the industry, as supported by the NTP, provides a rational basis for the decision. Finally, the court held that the new test adopted by the ICC was not in conflict with *Drum*.

Petitioners respectfully submit there are special and important reasons why this Court should review the decision of the Eleventh Circuit.

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latory Utility Commissioners and International Brotherhood of Teamsters. The carrier interests are aggrieved because the agency's decision will result inevitably in the diversion of traffic from regulated motor carriers to non-regulated owner-operators, commercial leasing companies and any other entity willing to provide a truck and driver for the carriage of the shipper's freight under a single-source leasing arrangement.

REASONS FOR GRANTING THE WRIT

(a) This Case Is Of Exceptional National Importance Because Of Its Critical Impact On The Viability Of The Regulation Of For-Hire Motor Carriage Congress Reaffirmed In The Motor Carrier Act Of 1980.

This Court has frequently granted certiorari when an agency establishes a standard which defines the scope of the administration of a remedial statute and affects the jurisdiction of that agency to regulate in the public interest. *See United States* v. *Drum, supra*; *United States* v. *An Article of Drug Bacto-Unidisk*, 394 U.S. 784 (1969), rehearing denied, 398 U.S. 954 (1969); and *62 Cases, More or Less, Each Containing Six Jars of Jam et al.* v. *United States*, 340 U.S. 593 (1951).

In *Drum*, this Court viewed the identical question, whether the ICC properly developed a standard for distinguishing for-hire carriage from private carriage, to be of sufficient national importance to warrant its review. Similarly, in *Bacto-Unidisk*, the Court granted certiorari to review an agency's interpretation of the term "drug," which was a prerequisite to involving the full measure of its regulations, because it raised issues of substantial administrative importance under the governing statute. 394 U.S. at 791.

Petitioners submit that the decision of the Eleventh Circuit poses the same crucial issues as those posed in these previous cases and thus warrants review. The Eleventh Circuit's decision undermines the essence of the system of economic regulation of for-hire carriage contemplated by Congress, and renders nugatory the recent legislative changes made by Congress in the MCA.[3] It will have a significant and swift impact on the regulation of

[3] Neither the ICC's nor the court's decisions adequately illuminates the severe adverse economic impact of the ICC's decision on regulated motor carriers. The agency record contains substantial evidence of freight diversion from regulated motor carriers to single-source leasing arrangements.

for-hire carriage, because every owner-operator, which are estimated to be in excess of 125,000, fleet owners, and all commercial leasing companies, such as Leaseway Transportation [4] which has over 8,000 drivers and 78,000 vehicles, are permitted to enter into unregulated and secretive leasing arrangements with shippers to perform transportation for-hire not subject to ICC regulation. Given huge nationwide commercial lessors such as Leaseway, the vast population of independent owner-operators, the vague and often-conflicting standards enunicated by the ICC (*see, e.g.*, Appendix A at 34a-35a n.34), and the systematic reductions in the ICC's enforcement staff, any meaningful enforcement of the new test will be impossible.

The Eleventh Circuit has concluded that the ICC's decision "is not inconsistent with the provisions of the Motor Carrier Act." [5] The court reached this erroneous conclusion, notwithstanding that by its own analysis the statutory provisions relied upon by the ICC provided no support for the decision.

The court noted that the ICC relied upon sections 5, 7, and 9 of the MCA. Among other things, section 5 reduces the burden of proof that an applicant has to meet in order to obtain motor carrier operating authority from the ICC. The court agreed with petitioners' argument that the "greater leniency in determining whether a particular arrangement constitutes private carriage might be viewed as inconsistent with a congressional policy of *encouraging* entry into the regulated sector" (emphasis in original).[6]

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[4] Attached as Appendix F is a full page advertisement of Leaseway Transportation which was placed on several recent occasions in prominent newspapers and periodicals having nationwide circulation.

[5] Appendix B at 89a.

[6] Appendix B at 87a. Additionally, in sections 5(b)(4) and 10(a)(2) of the MCA, Congress fashioned remedial relief for independent owner-operators in order to facilitate their business opportunities and increase their operating efficiencies. H.R. Rep. No. 96-1096, 96th Congress, 2d Sess. 16 (1980). These provi-

The Eleventh Circuit's decision clearly will discourage entry by "owner-operators" into the regulated sector because they can serve shippers as independent contractors while at the same time the shippers can shed themselves of the financial burdens of operating a transportation service. Moreover, it encourages regulated carriers to voluntarily seek revocation of their operating authority, which require compliance with ICC regulatory constraints and impose administrative costs, and substitute single-source leasing arrangements.

The court was unable to draw any "inferences" from sections 7 and 9 of the MCA in support of the ICC's decision.

Section 7 was intended by Congress to benefit both private carriers and owner-operators by increasing the number of commodities exempt from ICC regulation. In reviewing the legislative history of the provision, the court noted that the Senate expressed "continued concern for the diversion of traffic by private carriers from the regulated carrier industry."[7] This congressional concern will become stark reality under the Eleventh Circuit's decision, which in effect renders all commodities exempt when transported under single-source leasing arrangements between shippers and a variety of unregulated entities.

Section 9 of the MCA permits a 100 percent wholly-owned transportation company to provide compensated

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sions established an entry provision permitting independent owner-operators to transport food and related products upon a demonstration that they are fit, willing and able to perform the service. *See* Appendix E at 101a-102a, *also* House Report at 16-17. This "fitness-only" test is an exception to the more exacting entry standard required of applicants generally; ordinarily applicants must demonstrate fitness *and* that the proposed service will serve a useful public purpose, responsive to a public need or demand.

[7] Appendix B at 88a, citing S. Rep. No. 96-641, 96th Cong., 2d Sess. 8 (1980).

intercorporate hauling for its parent corporation and affiliates. Testimony before Congress had revealed that the ICC's administrative prohibition against compensated incorporated hauling by shippers without operating authority had "prevented many corporate families from maximizing their transportation potential." [8] The court properly recognized that Congress rejected a proposal to require only 51 percent ownership to qualify and insisted upon a 100 percent ownership, explaining that it was "preserving the essential role of private carriage, but doing so with a minimum conflict with the common carrier concept." [9] Under the Eleventh Circuit's decision, a shipper's transportation subsidiary which is less than 100 percent affiliated with its parent or subsidiary companies can engage in compensated intercorporate hauling simply by utilizing the device of single-source leasing arrangements. This result will defeat the intent of Congress, which carefully weighed and prescribed the scope of section 9.

It is clear from the legislative history of the MCA, that Congress sought to address and remedy the specific problems which the affected persons, "including drivers, independent owner-operators, shippers, truckers, and consumers," [10] made known to it. It did so through carefully designed and precise revisions in the law.[11] It is significant that despite the many regulatory revisions legislated through the MCA, Congress left intact the fundamental regulatory requirements which have historically

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[8] House Report at 21-22.

[9] Appendix B at 87a.

[10] House Report at 3.

[11] "The Motor Carrier Act of 1980 is the product of over 18 months of continuous study of one of the most complex issues ever undertaken by [. . . Congress]." House Report at 1. The Congress "worked hard to forge a workable, practical, reasonable piece of legislation that will modernize the current regulatory system." *Id.* at 9.

governed the for-hire motor carrier industry. Congress has retained the statutory requirement that for-hire motor carriers *must* obtain operating authority from the ICC *before* performing for-hire transportation. Congress has preserved the statutory prescriptions that for-hire motor common carriers of property must file and publish tariffs containing their rates. Discriminatory and predatory pricing continue to be unlawful. Congress left untouched the long-standing statutory definitions of "motor carrier," "motor common carrier," "motor contract carrier," and "motor private carrier," [12] thus preserving the statutory bounds within which the distinct sectors of the industry may lawfully operate.

Petitioners submit that the Eleventh Circuit erred when it found the ICC's decision not to be inconsistent with the MCA. Its own analysis of the MCA and its findings require the conclusion that Congress did not expressly or implicitly provide the ICC with the statutory authority to devise a test which undermines and renders meaningless the MCA, in general, and sections 5, 7, and 9, in particular.

Congress was extremely careful to provide the ICC with explicit direction and well-defined parameters in the MCA. Section 3 emphatically warns:

> . . . that in order to reduce the uncertainty felt by the nation's transportation industry, the Interstate Commerce Commission should be given explicit direction for regulation of the motor carrier industry and well-defined parameters within which it may act pursuant to congressional policy; that the Interstate Commerce Commission should not attempt to go beyond the powers vested in it by the Interstate Commerce Act and other legislation enacted by Congress; and that the legislative and resulting changes should be implemented with the least amount of disruption to the transportation system consistent with the scope of the reforms enacted.

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[12] Appendix E at 99a-100a.

Review by this Court is manifestly necessary and warranted in order to preserve any meaningful distinction between private and for-hire carriage which Congress intended.

(b) The Decision Of The Eleventh Circuit Conflicts Directly With A Decision Of The Fifth Circuit Regarding The National Transportation Policy.

Because there are no specific provisions in the MCA which expressly support its actions, the ICC relied upon the National Transportation Policy (NTP), 49 U.S.C. § 10101, as an independent source of authority for its decision to adopt a more lenient policy toward single-source leasing arrangements and thereby enhance the economic and competitive positions of unregulated private carriers, owner-operators, and leasing companies. Appendix A at 25a-26a. Both before the agency and in the court below petitioners challenged that reliance. They argued that the NTP acts only as a guideline to the ICC in carrying out its delegated regulatory powers and cannot be construed as a congressional mandate to the agency to improve the economic position of unregulated entities to the detriment of regulated carriers. The ICC calls this contention "untenable". Appendix A at 25a. The court below also rejects petitioners' argument, concluding "that the Commission's assertion of changes in the industry, as *supported by the National Transportation Policy*, provide a rational basis for" the ICC's action (emphasis supplied).[18]

The ICC's and Eleventh Circuit's interpretation of the reach of the NTP is in direct conflict with the recent interpretation of the Fifth Circuit in *Central Forwarding*,

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[18] Appendix B at 90a. In arriving at this proposition, the court relied upon statements of this Court in *American Trucking Associations* v. *Atchison, Topeka & Santa Fe Railroad Company*, 387 U.S. 397 (1967). However, the Eleventh Circuit's reading of *Atchison* was selective and out of context and is thus in error. Read in its entirety, it is manifestly clear that *Atchison* does not ascribe such power to the NTP.

Inc. v. *ICC*.[14] *Central Forwarding* involved an ICC effort to improve the working conditions of unregulated owner-operators by fixing compensation to be paid them by regulated carriers. The ICC claimed that it was empowered to act in this manner by virtue of various terms of the NTP. The Fifth Circuit unanimously rejected the ICC's argument, holding that "[t]he statute [referring to the NTP] does not purport to grant any powers to the Commission" but rather operates to "constrain [the ICC] to act in accordance with the mandates provided in the statutes;[15] it exists neither as an "independent" nor "unfettered" source of regulatory authority.[16] As the Fifth Circuit properly reasoned:

> . . . Such a reading would make superfluous much of the rest of the Revised Interstate Commerce Act, with its detailed guidelines and delegations of authority, ... Such a reading would also make meaningless section 3 of the Motor Carrier Act of 1980 (citation omitted), admonishing the Commission to stay within the "well-defined parameters . . . vested in it by the Interstate Commerce Act and other legislation enacted by Congress. . . ."[17]

The Fifth Circuit's decision respecting the reach of the NTP cannot be squared with the Eleventh Circuit's decision on the same matter. Under the Fifth Circuit's decision, a congressional policy encouraging "fair wages and working conditions" in the regulated transportation industry does not empower the ICC to enhance the economic position of unregulated owner-operators. On the other hand, the Eleventh Circuit has approved ICC reliance on congressional policy favoring competitive and efficient regulated transportation to justify agency action designed

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[14] 698 F.2d 1266 (1983).

[15] *Id.* at 1283.

[16] *Id.* at 1284. The ICC did not appeal the Fifth Circuit's decision.

[17] *Id.* The Court went on to question whether such a congressional grant of authority "might well amount to an unconstitutional delegation of legislative authority." *Id.*

to enhance the competitive position of unregulated owner-operators. The Eleventh Circuit was obviously troubled by that reliance and attempted to deal with the problem as follows:

> Further, we find no clear error of judgment in the Commission's assertion that competition will be enhanced by the proposed relaxation of standards with respect to single-source leasing by shippers. Even if the amendments to the National Transportation Policy were concerned only with the regulated sector, it would be rational to assume that providing owner/operators alternatives to employment solely with common and contract carriers would lead to greater competition for their services within that sector. Such competition would in turn foster a healthier transportation industry in both the regulated and unregulated sectors.[18]

This attempted resolution only exacerbates the problem. Contrary to *Central Forwarding* the court below approves agency action which has no basis in the substantive provisions of the Act simply because in its view that action will "foster [a] healthier . . . unregulated sector." Moreover, the Eleventh Circuit is wrong not only on the law on this point but in its reasoning as to the kind of competition contemplated by the NTP. According to the court below, the NTP encourages competition among regulated carriers and between those carriers and shippers for the *services* of truck drivers and their trucks. There is nothing in the Act to support such reasoning. Competition for the services of truck drivers tends to increase the price paid for those services. Increased prices paid by carriers and shippers for the *serv-*

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[18] Appendix B at 89a-90a. In reaching this conclusion, the Eleventh Circuit has supplied its own reasoned basis for the ICC's action—one which the ICC had not provided. In so doing, the Eleventh Circuit violated a fundamental principle of this Court, that reviewing courts should not attempt to make up for deficiencies in an agency's decision by supplying their own reasoned basis. SEC v. Chenery Corp., 322 U.S. 194, 196 (1947).

ices of truck drivers is an increase in the cost to them of providing the goods and services they sell. Those increased costs, in turn, must be recovered by increasing the prices charged the public for those goods and services. Thus, the kind of competition envisioned by the court below will tend to *increase* prices for the regulated carriage of goods whereas the kind of competition for freight traffic contemplated by the MCA designed to *lower* those prices. The reasoning of the court below on this point has so far departed from the plain meaning of the statute as to call for an exercise of this Court's power of supervision.

(c) The Decision Conflicts With The Decision Of This Court Regarding The Control And Characteristic Burdens Of Transportation A Shipper Must Assume In Leasing Arrangements.

In 1962, this Court articulated the test governing the determination whether a single-source leasing arrangement constitutes for-hire or private carriage. *United States* v. *Drum*, 368 U.S. 370 (1962). In *Drum*, this Court upheld an ICC decision that owners of transportation equipment, who leased their vehicles and hired their services to a shipper, but retained the expense of maintaining and operating the equipment, and the risk of casualty loss and premature depreciation, were, in *substance*, engaged in for-hire transportation. Under these circumstances, this Court found that the shipper had shed itself of what the Court referred to as "the characteristic burdens of transportation" and was purchasing for-hire carriage from an unregulated entity contrary to the Interstate Commerce Act.

The statutory definitions of common carrier, contract carrier, and private carrier have not changed since 1962. Because they are imprecise, the Commission is permitted some discretion in framing a workable test that is consistent with the objectives of economic regulation.[19] As

[19] This Court stated in *Drum* that "[a] primary objective of the scheme of economic regulation is to assure that shippers generally

this Court recognized, however, the test developed must impose practical limitations upon unregulated competition with a regulated industry. *Id.* at 375. The test approved by the Eleventh Circuit imposes neither practical nor enforceable limitations.

The test announced by this Court in *Drum* was a two-part "control" and "substance" test. A shipper had to establish that it possessed and exercised the right to control, direct, and dominate the transportation. The control test focused on operational control. It was supplemented by the substance test, which examined whether, in fact, the circumstances indicated that the shipper had assumed the characteristic burdens of transportation.

In *Drum*, this Court assumed that the shipper did control the operation. *Id.* at 381, and nn. 23 and 24. It noted that the ICC's "interest in 'control' in turn generated an interest in whether the drivers of the leased equipment were in substance treated as the shipper's employees." *Id.* at 382. A requisite genuine employment arrangement was found to be present.[20] *Id.* at 379. Justice Harlan, in the dissent, repeatedly emphasized that the presence of a *bona fide* employee relationship was fundamental to his conclusion that the leasing arrangement was in substance private carriage. *Id.* at 393-396.

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will be provided with a healthy system of motor carriage to which they can resort to get their goods to market." *Id.* at 374. It identified two purposes served by the economic regulation of motor carriers. First, it permitted the ICC to review motor carrier rates and services for the protection of shippers. *Id.* at 375. Second, it limited the ability of private carriers to divert traffic which would harm regulated carriers upon which shippers rely. *Id.* As discussed in subsection (a), *supra*, the MCA reaffirmed the economic regulation of the motor carrier industry and carefully delineated and circumscribed new opportunities for private carriers and owner-operators.

[20] An employment relationship was established under a collective agreement with the union which provided the lessors with employment privileges enjoyed by its employees. *Id.* at 378.

The Eleventh Circuit has now rejected this prerequisite of an employment relationship and will permit shippers to lease directly equipment with drivers who remain independent contractors. The court's decision is in conflict with this Court's reasoning that a *bona fide* employee relationship is fundamental to a determination that a leasing arrangement is in substance private carriage. To petitioners' best knowledge, an employment relationship has been present in *each* case in which the ICC has held that the leasing arrangement was legitimate private transportation.[21] Thus, the Eleventh Circuit's decision violates the longstanding coherent body of administrative and judicial precedent.

In *Drum*, this Court for the first time articulated the requirement that a shipper must assume the "characteristic burdens of transportation." *Id.* at 375. These burdens were stated as: (1) the risk of premature depreciation or catastrophic loss of equipment, (2) the risk of a rise in variable operating and maintaining costs, and (3) the risk of equipment non-utilization. *Id.* 379-380.

The test sanctioned by the Eleventh Circuit clearly rejects this Court's ruling that a shipper's assumption of these characteristic burdens of transportation are essential to *bona fide* private carriage. The Eleventh Circuit sanctioned this departure for three reasons. First, it stated that since *Drum*, the ICC has restated the test of substance in terms of the characteristic burdens of transportation. Appendix B at 77a, citing *Personnel Service, Inc.—Investigation of Operations and Practices*, 110 M.C.C. 695, 704-706 (1969); *Heavy Equipment Rental Co., Investigation*, 98 M.C.C. 365, 394 (1964). Second, the court stated that the *Drum* decision reflects a judicial deference to the agency's judgment on what burdens are

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[21] *See, e.g., Lovell—Investigation of Operations*, 92 M.C.C. 728 (1963); *Rayette, Inc.—Investigation of Operations*, 108 M.C.C. 410 (1969); and *Ontario Company—Declaratory Order*, 112 M.C.C. 211 (1970).

characteristic. Finally, the court felt that the examination of various factors surrounding the leasing arrangement through the new test is consistent with *Drum*.

Petitioners agree with the Eleventh Circuit that the ICC may and should examine the circumstances surrounding the lease. However, the Eleventh Circuit misinterpreted *Drum* when it failed to recognize that an employment relationship is a fundamental burden a shipper must assume under the substance test and that the burdens which are "characteristic" of motor carrier transportation cannot be altered by changes in the ICC's regulatory philosophy.

Contrary to the suggestion of the Eleventh Circuit, neither *Personnel Service* nor *Heavy Equipment Rental* involved a significant, if any, departure from the reasoning and characteristic burdens test this Court articulated in *Drum*. In *Personnel Service*, the ICC found the lease to constitute legitimate private carriage because of the "true employer-employee relationship between shipper and driver" and because the shipper's payments to the lessor were "very closely and directly related to the actual costs incurred in the operations of the instrumentalities. . . ." 110 M.C.C. at 709-710. The evidence indicated that the shipper bore the financial burden of equipment maintenance, rising variable costs of wages and fuel, and non-use of equipment. *Id.* at 710. In *Heavy Equipment Rental*, the ICC concluded that the lease was unlawful for-hire carriage because the circumstances indicated that "the employer relationship with the drivers is illusory" and the shipper had divorced itself from the transportation. 98 M.C.C. at 394. The failure of the shipper to bear the burden of equipment expenses for fuel, lubricants, tires, operating supplies, and necessary repairs was considered by the ICC and is entirely consistent with *Drum*.

The fact that the ICC may have assimilated the characteristic burdens of transportation under the substance

test does not provide support for the Eleventh Circuit's rejection of the longstanding and essential requirement of (1) an employment relationship between the shipper and the equipment operator, and (2) assumption by the shipper of the requisite financial burdens incurred in the carriage of its goods.

For these reasons, petitioners submit that the Eleventh Circuit's decision conflicts with *Drum* and the coherent body of legal precedent.

CONCLUSION

For all of the reasons set forth herein, Petitioners pray that a writ of certiorari issue to the United States Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

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APPENDICES

APPENDIX A

EC

INTERSTATE COMMERCE COMMISSION

Ex Parte No. MC-122 (Sub-No. 2)

Lease of Equipment and Drivers to Private Carriers

Agency: Interstate Commerce Commission

Action: Policy Statement

Summary: By this notice, the Commission modifies and makes final its proposed policy statement in *Lease of Equipment and Drivers to Private Carriers*, 132 M.C.C. 351 (1980), 45 Fed. Reg. 86766 (December 31, 1980), concerning the distinction between private and for-hire carriage where a private carrier conducts its operations with equipment and drivers leased from unregulated lessors, including owner-operators. Discussed is the practical and legal distinction, and the factors that the Commission will now consider in determining whether such operations by private carriers fall outside the scope of the Commission's jurisdiction, 49 U.S.C. § 10524(a), or instead constitute for-hire transportation by the lessor of the equipment with drivers, for which a certificate or permit is required.

Effective Date:

This policy is effective 30 days from the date of publication of this notice in the Federal Register.

FOR FURTHER INFORMATION CONTACT:

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or

Edward E. Guthrie
(202) 275-7691

SUPPLEMENTARY INFORMATION:

This proceeding was instituted on December 31, 1980, by the publication of a notice in the Federal Register [1] stating our intention to reexamine the Commission's tests used to distinguish private from for-hire carriage. The tests operate generally to preclude owner-operators and others not holding authority from the Commission from leasing their equipment with drivers directly to private carriers. We recognize the continued need to maintain a workable distinction between for-hire and private carriage. We propose (a) to focus primarily on the control exercised over a lessor, and (b) to repudiate the presumption that construed lessors to be carriers for hire where their lessees are private carriers.

Comments—Generally

The Commission received approximately 155 comments, representing over 200 persons.[2] Commentors may be placed in four general groups. There were approximately 40 comments from individuals, the vast majority of whom identified themselves as owner-operators. With four exceptions, all owner-operators endorsed our proposal. Comments were received from 30 manufacturers and shippers, many of which operate private fleets. All shippers and manufacturers agreed with the basic principle of allowing

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[1] 45 Fed. Reg. 86766 (December 31, 1980), *Lease of Equipment and Drivers to Private Carriers*, 132 M.C.C. 351 (1980).

[2] See Appendix A.

owner-operators to lease directly to shippers/private carriers, although many commentors in this group proposed modifications. Over 30 associations and trade groups responded. Generally, associations representing owner-operator and shipper interests were in favor of the proposal, while associations and trade groups representing the regulated motor carrier industry opposed it. Lastly, over 120 regulated motor carriers voiced their opposition to the proposal.

In addition to written comments, the Commission on October 14, 1981, conducted an oral hearing in Washington for the purpose of eliciting additional views and supplementing the record.[3] Twenty-seven parties, representing over 45 interests, appeared and presented evidence which substantially echoed their respective or representative comments filed earlier.

Conclusions

In light of recent changes in statutory direction, and the Commission's changes in regulatory policy over the past few years, we believe it is reasonable to reassess the Commission's approach to defining the line between private and for-hire carriage. We think we can prospectively draw the line somewhat differently than we have in the past when considering whether a particular lease arrangement constitutes private vis-a-vis for-hire carriage, based on the consideration of factors not previously identified in Commission decisions.

We shall continue to look at all the circumstances surrounding a lease arrangement to determine whether the lessor holds out only the use of the instrumentalities of transportation, *i.e.*, truck and driver, or whether it instead holds out what is in substance a complete transportation service for compensation. The former would be

[3] See *Notice Of Oral Argument On Proposed Policy Statement*, served September 29, 1981, 46 Fed. Reg. 48344.

exempt, while the latter would be subject to regulation. In making individual determinations, we will focus on the elements of control, responsibility, and performance of the key organizing and management functions of a transportation company as the critical elements in evaluating the character of the service provided. We will, however, no longer employ the rebuttable presumption announced in the *Church* case, *infra*, that leases of equipment with drivers to shippers ordinarily give rise to for-hire transportation by the lessor. Neither will we use the virtually irrebuttable presumption contained in the *Oklahoma Furniture* decision *infra*, that an owner-operator driving his own equipment has the right and power to defeat the lessee's control. We will abandon the suggestion contained in earlier cases that legitimate private carriage results only when an owner-operator becomes an employee of the private carrier. We also believe that there is no longer any justification for maintaining different standards for judging lease arrangements with drivers, depending on whether the lessee is a private or for-hire carrier.

We are confident that our new approach is in accord with existing statutory requirements. Nevertheless, we intend to monitor the practical effects of the policy change we are adopting on the regulated sector, private carriers, owner-operators, and the shipping public on a continuing basis. If actual operations under the new policy disclose effects that are clearly contrary to the public interest or the National Transportation Policy, we are prepared to make adjustments or changes in our policy.

Preliminary Matters

Various commentors raise three objections directed more to the Commission's procedures than to the merits of our proposal. Commentors claim, first, that Congress has recently considered and rejected a similar proposal, and that we may not now proceed to overturn that legislative determination; second, that a policy statement is an inap-

propriate vehicle for our proposed changes; and, third, that we have evidenced a prejudgment of the issues presented. We find no merit in any of these claims.

1. *Legislative History.* Nothing in the legislative history prevents the action we are proposing. The commentors have not pointed out to us, and our research has not revealed, any measure similar to our proposal here which was explicitly examined by either the Senate or the House during their deliberations on the Motor Carrier Act of 1980.[4] Congress plainly left a number of regulatory problems unaddressed in the Act. The fact that Congress could have legislated further, or that Congress directly addressed certain concerns, cannot be considered as an explicit determination to preclude the exercise of our statutory authority to reexamine policy areas not specifically addressed by Congress, provided our ultimate determination is consistent with the law and is a reasonable exercise of our discretionary authority.

2. *Use of a Policy Statement.* Several commentors object to the use of a policy statement rather than a substantive rule as a vehicle for setting forth new guidelines regarding the distinction between private and for-hire carriage. Ryder Truck Lines, for example, contends that our policy statement will have a substantial impact on motor carrier operations and, therefore, should be conducted within the ordinary rulemaking provisions of the Administrative Procedure Act (APA).

The procedural objections of the various commentors are without merit since we have in fact given full notice of our proposal, have received comments, and, following

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[4] Schneider Transport *et al.*, assert that Congress rejected proposals to grant owner-operators backhaul authority for all commodities and authority to lease to shippers. (See their comments at page 3.) They point to no express rejection, however. The overall tone of their presentation suggests that any such rejection is to be implied from the fact that the area of private carriage was generally considered during development of the Motor Carrier Act.

examination of the comments, are announcing the new guidelines on 30 days' notice, all as required by section 553 of the APA. In other words, we have fully complied with all applicable requirements for notice-and-comment rulemaking. See *American Bus Ass'n* v. *United States*, 627 F.2d 525 (D.C. Cir. 1980).

However, we believe that something less rigid than a formal rule is more suitable to our purposes here. An interpretative rule is a statement issued by an agency to advise the public of the agency's construction of the statute it administers, or what the court described in *Guardian Federal Savings and Loan Ass'n.* v. *FSLIC*, 589 F.2d 658, 664 (D.C. Cir. 1978), as a clarification or explanation of an existing statute. A policy statement is a statement issued by an agency to advise the public prospectively of the manner in which the agency proposes to exercise a discretionary power. See generally, *Attorney General's Manual on the Administrative Procedure Act* (1947) at page 30. Our proposal falls within both of these definitions.

Our purpose in issuing this policy statement is to announce to the public what factors we will consider as sufficient to establish private carriage with leased equipment and drivers, so that affected parties may conform their future conduct to the statute as interpreted by the Commission and thus avoid Commission enforcement action. Whether any particular arrangement constitutes private or for-hire carriage will continue to be decided on a case-by-case basis in light of the facts disclosed in that case. Use of an interpretive or policy statement thus seems to be quite permissible. See *Regular Common Carrier Conference* v. *United States*, 628 F.2d 248 (D.C. Cir. 1980).

3. *Purported Prejudice.* The Regular Common Carrier Conference of the American Trucking Associations (RCCC) asserts that we have prejudged the issues pre-

sented in favor of the proposal, and have unfairly placed upon commentors the burden of dissuasion. The Conference points to a number of statements in our notice which it believes demonstrates our asserted predetermination.

The RCCC seriously misconceives the nature of the notice-and-comment process. Our preliminary review of the subject area satisfied us that some review of the traditional tests for distinguishing between private and for-hire carriage was warranted in light of statutory changes and the enormous growth of private and for-hire carriage. The major necessity, we concluded, was to reassess what the statute required and review what types of distinctions need to be maintained between private and for-hire carriage. We also had doubts about the continued validity of the legal presumptions which have been employed through the years and have had the effect of precluding shippers from engaging the services of owner-operators in factual circumstances where we now believe that legitimate private carrier operations can be conducted. We sought comments on our analysis and the effect of possible changes on the concerned parties. As will be seen, our overall assessment, including our legal analysis, has changed somewhat in light of the comments submitted.

History of the Commission's Approach to the Leasing Issue

1. *Leasing To Shippers.* The issue with which this proceeding is concerned has been before the Commission ever since the passage of the Motor Carrier Act of 1935. By that Act, Congress undertook to regulate interstate motor carriage for hire (with certain exceptions not here relevant),[5] but excluded from its coverage the carriage by shippers of their own goods;[6] it also did not bring

[5] The precise limits of the Commission's jurisdiction over motor carriage are codified at 49 U.S.C. 10521(a).

[6] The exclusion of private carriage is codified at 49 U.S.C. 10524(a). This provision stems not from the 1935 Act itself, but

under regulation those persons who merely lease or provide to others the instrumentalities of transportation, *e.g.*, truck and drivers.[7] The problem arose by drawing the line, among a nearly infinite variety of business arrangements, between those activities which must be licensed by the Commission and those that are exempt from licensing. As summarized in *United States* v. *Drum*, 368 U.S. 370, 374 (1962):

> The Commission, therefore, has had to decide whether a particular arrangement gives rise to that "for-hire" carriage which is subject to economic regulation in the public interest, or whether it is, in fact, private carriage as to which Congress determined that the shipper's interest in carrying his own goods should prevail.

The leading decision by the Commission is *H.B. Church Truck Service Co. Com. Car. Application*, 27 M.C.C. 191 (1940), involving an applicant for authority which, as a sideline, leased trucks with drivers to a few shippers.[8] The Commission found that the leasing service was not held out to the general public; that the leased trucks were painted to suit the particular shippers, and served no one

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from a 1958 amendment which was intended to write into the statute the "primary business" test applied by the Commission in the *Lenoir Chair* case. See *Brooks Transp. Co.* v. *United States*, 93 F. Supp. 517 (E.D. Va. 1950), *aff'd*, 340 U.S. 940 (1951); Interstate Commerce Commission, *Seventy-First Annual Report* (1957), p. 137; *Seventy-Second Annual Report* (1958), pp. 132-133. See also the definition of "motor private carrier" codified at 49 U.S.C. 10102(14).

[7] *Rittenhouse-Investigation of Certificate*, 78 M.C.C. 389 (1958); *Personnel Service Inc., et al.—Investigation*, 110 M.C.C. 695 (1969).

[8] Since the applicant was plainly a common carrier for most purposes, it was frequently referred to as "the carrier", even in that portion of the opinion where the question at issue was whether the applicant in its leased-truck activities was acting as a lessor or as a carrier for hire.

else; and that the applicant provided the truck and driver, maintained the vehicle, and paid all operating expenses including property, public liability, and collision insurance. In the course of holding that this operation represented contract carriage, the Commission said (27 M.C.C. at 195-96):

> With reference to the leased-truck operations, the first question presented is whether the operation is that of applicant, as the performance of transportation for hire, or whether it is private carriage, performed by the shipper. The line of distinction between the two is not always clear. Essentially the issue is as to who has the right to control, direct, and dominate the performance of the service. If that right remains in the [lessor] carrier, the carriage is carriage for hire and subject to regulation. If it rests in the shipper, it is private carriage and not subject to regulation * * *. *The question as to who has the right to control and direct must be answered in the light of all the facts and circumstances surrounding the transaction between the carrier and shipper, and of the actual practices in the conduct of the operation thereunder.* No one element of such facts and circumstances is by itself conclusive.
>
> Clearly, so-called leases of equipment by a carrier to a shipper may differ materially in their results from a regulatory standpoint from leases by one carrier to another. The former are sometimes subterfuges and devices to evade regulation, particularly as to operating authority and rates. The public interest requires that we use diligence to prevent evasions of regulation through such devices. Consequently, in cases in which the question of the status created by a lease of equipment with drivers by a carrier to a shipper is presented, in the absence of a showing to the contrary, the presumption arises that the transportation is performed by the carrier for compensa-

> tion, in other words is for-hire transportation and as such is subject to regulation. This presumption will, of course, yield to a showing that the shipper has the exclusive right and privilege of directing and controlling the transportation service, as, for example, if the equipment were operated by the shipper's employee. (Emphasis added)

The *Church* decision stated that the presumption of for-hire transportation would yield to a showing that the shipper-lessee had "the exclusive right and privilege of controlling the transportation service". The Commission continued, however, to take into account "all the facts and circumstances surrounding the transaction" (as provided in *Church*), including facts and circumstances having no obvious bearing on the issue of exclusive control (*e.g.*, the form of compensation received by the lessor). In time, this concern for facts and circumstances not directly related to control came to be articulated as a secondary test of "substance", *i.e.*, "are any persons here [before the Commission], in substance, engaged in the business of interstate or foreign transportation . . . for hire?" *Pacific Diesel Rental Co.—Investigation of Operations*, 78 M.C.C. 161, 172 (1958).[9] As late as *Pacific Diesel* it was stated that "control" and "substance" were really a single test, although articulated in two alternative forms; but the following year, in *Oklahoma Furniture Mfg. Co.—Investigation of Operations*, 79 M.C.C. 403, 409-10 (1959), these were stated as two separate questions to be answered.

The Commission had indicated in *Church* that a shipper could rebut the presumption of for-hire carriage and establish the existence of *bona fide* private carriage by placing the driver of the leased equipment on its payroll as an employee. Where the driver of the leased equip-

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[9] The quoted language is paraphrased from *Georgia Truck System* v. *I.C.C.*, 123 F.2d 210, 212 (5th Cir. 1941).

ment was also its owner, however, it held in *Pacific Diesel* that the continuing relationship of the owner-drivers to the lessor (a leasing company) negated the inference of exclusive control in the lessee-shippers based on the terms of the written lease arrangements between them and the lessor and the fact that each shipper placed the driver or drivers on its payroll for the duration of its lease.[10]

The following year, in *Oklahoma Furniture, supra*, the Commission came to the same conclusion even though in this case there was no intermediary and no indication of control by anyone but the shipper; the leases from the owner-operators to the shipper were long-term; and the Commission assumed, *arguendo*, that the status of the owner-operators as employees of the shipper was *bona fide*. Notwithstanding these significant differences from *Pacific Diesel*, the Commission found (79 M.C.C. at 411):

> There is present, whenever the owner-operator drives his own equipment, the right and power of the lessor to defeat any supposed right of control that the shipper-lessee may believe exists. We are satisfied that the company does not have the exclusive right and privilege of controlling the transportation service considered.

As to the "substance" test, the Commission concluded that the arrangements between the shipper and the owner-operators constituted contract carriage. It pointed to the

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[10] *Pacific Diesel Rental Co., supra.* The owner-drivers leased their rigs to Pacific Diesel, which then subleased the equipment to a number of shippers. Although the latter lease agreements ostensibly allowed the shippers to furnish their own drivers, in fact the vehicles were invariably driven by their owners. The evidence indicated that the drivers typically reported en route to Pacific Diesel rather than to the shippers, and that the shippers traced the vehicles through Pacific Diesel; and there was other evidence of control by Pacific Diesel over en-route operations. The Commission found the overall pattern to be more akin to typical common carriage on the part of Pacific Diesel than to private or even contract carriage.

various transportation risks borne by the owner-operators rather than the shipper, and held that none of the departures from the usual conditions of contract carriage shown by the evidence were sufficient to distinguish the arrangement at issue from such carriage.

Commissioner Webb, in his dissenting statement (79 M.C.C. 416, at 417), said of the result:

> No one can fail to grasp the significance of this sweeping pronouncement. It means, plainly and simply, that . . . the mere status of owner-operator-lessor is said automatically to defeat lessee control irrespective of the existence of convincing facts to the contrary.[11]

The Supreme Court in *Drum, supra*, affirmed the Commission, but its opinion did not preclude the Commission from now eliminating the presumption that the leasing of both equipment and driver services from the same source constitutes for-hire transportation.

The Court began its analysis by noting that the statute evinces a purpose to "impose practical limitations upon unregulated competition in a regulated industry". 368 U.S. at 375. By this we think it clear that the Court meant that the Commission must devise practical and meaningful distinctions between for-hire and private carriage so that persons may not simply engage in unregulated competition with the regulated industry under the guise or label of private carriage.

The Court then went on to say (368 U.S. at 375; emphasis supplied):

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[11] The dissent further cited fifteen indicia of true private carriage in the facts of record, and concluded that "it is highly unlikely that there is any carrier in the United States whose connection with the prime attributes of transportation service is as tenuous as that of the respondents [owner-operators]."

> From the outset the Commission has correctly interpreted [the statutory definitions] as importing that a purported private carrier who hires the instrumentalities of transportation from another must—if he is not to utilize a licensed carrier—*assume in significant measure the characteristic burdens of the transportation business.*[12]

This indicates the Court's judgment of the basic test that the statute requires—*i.e.*, assumption of "the charctertistic burdens of the transportation business".

Applying this basic test, the Court then reviewed the particular facts and concluded that the Commission was within its discretion in finding that the shipper had not assumed enough of the burdens of transportation. In particular, the Court, like the Commission, focused on the financial burdens left with the owner-operator, including the risk of a "rise of variable costs such as fuel, repairs and maintenance", the risk of equipment loss or damage, and "the risk of non-utilization of high priced equipment." 368 U.S. at 379-380.

Two significant conclusions pertinent to the present inquiry can be drawn from the opinion in *Drum*. First, the opinion does *not* indicate that the statute requires the Commission to *presume* that leasing both equipment and driver from the same source constitutes for-hire transportation. Indeed the Court's opinion is in no way based on any such presumption. So long as we can reasonably conclude that the shipper bears the characteristic burdens of transportation to a significant degree, we may find

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[12] 368 U.S. at 384. The phrases "burdens of transportation" or "the characteristic burdens of the transportation business" (368 U.S. at 375) do not seem to have been employed in any Commission decision up to that time. However, the Court made clear that it was not formulating a new test of its own, but was simply restating in clearer language the "substance" test which it considered the Commission had been applying all along.

private carriage even though the equipment and driving services are leased from the same source.

Second, the Court's affirmance of the Commission's weighing of the financial burdens in the *Drum* case itself does not establish that that kind of financial burden analysis is statutorily required, or that those particular burdens must always fall on the shipper. The opinion makes clear that the Court was, at bottom, deferring to the Commission's considerable discretion in weighing the totality of factors on a case-by-case basis, and affirming it because it was not unreasonable. Thus, the Court clearly recognized, at 368 U.S. 375-76, that application of the "burdens" test in individual cases is a matter for our judgment:

> the problem is one of determining—by reference to the clear but broad remedial purpose of a regulatory statute committed to agency administration—the applicability to narrow fact situations of imprecise definitional language which delineates the coverage of the measure.

Later in its opinion, 368 U.S. at 384, the Court noted that the "Commission allowably dealt with this novel situation as an integral and unique problem in judgment, rather than simply as an exercise in counting common places. Nor did it leave the basis for its decision unarticulated." The Court also recognized that Congress gave us a "range of responsibility" when determining the definition of a particular operation. 368 U.S. at 385. The Court found the Commission's conclusion that financial risks are a significant burden of transportation to be well within that range. *Id.* Finally, the Court criticized the district court for attempting to inject its judgment into the agency's domain. 368 U.S. at 386.[13] All of these state-

[13] 368 U.S. at 385 Justices Harlan and Whittaker dissented; Justices Douglas and Black concurred in a brief statement calling the case "a marginal one on which commissioners as well as judges might differ." 368 U.S. at 386.

ments show that we have flexibility to determine when a private carrier has assumed the characteristic burdens of transportation.

In decisions subsequent to *Drum*, the Commission has often relied largely on the "burdens" (formerly "substance") test affirmed in *Drum*, which essentially answers the earlier "control" test, and leases by owner-operators to shippers have been upheld as private carriage. In *Ontario Company—Declaratory Order*, 112 M.C.C. 211 (1970), for example, the Commission found private carriage where owner-operators leased their rigs to a shipper for periods of 35 days at a time, were paid a fixed weekly rental and reimbursed their actual expenditures for fuel, oil, tolls, and en-route repairs, and were placed on the shipper's payroll. The lease agreements gave the shipper "exclusive possession and control", and the shipper specified the places and times of pickup and delivery (it allowed the owner-operators to select the route).[14] Similarly, in *Rayette, Inc.—Investigation of Operations*, 108 M.C.C. 410 (1969), the Commission summarily affirmed an Administrative Law Judge's finding of private carriage where owner-operators leased their rigs to a shipper from month to month and were paid union-scale wages plus certain additional sums for stop-offs and extra hours, and were reimbursed for tolls, extra labor, and fuel taxes. The separate rental fees for the trucks were calculated on a mileage basis, out of which the operators paid for fuel, oil, meals, lodging, and repairs and maintenance. The shipper established the delivery schedules, but the operators chose routes and rest stops. Equitable title to the equipment was in the owner-operators, but legal title was held in trust by the shipper (the trust being revocable on demand) to aid the owner-operators in obtaining both financing and state vehicle registration. The Administra-

[14] This decision was upheld on judicial review in *National Motor Freight Traffic Ass'n* v. *United States* (No. 480-71, D.D.C., Apr. 25, 1973) (complaint dismissed).

tive Law Judge, in distinguishing earlier cases such as *Drum*, cited particularly the shipper's holding of legal title to the equipment. The judge minimized the importance of the fact that the owner-operators rather than the shipper bore the risk of nonutilization of expensive equipment—a factor stressed in *Drum*—on the basis that here the risk was purely theoretical, since all the leased equipment and drivers had in fact been kept busy full time for many ye rs.[15]

Subsequent to *Ontario* and *Rayette*, and up to the passage of the Motor Carrier Act of 1980, there have been no noticeable shifts in the Commission's decisional standards regarding leases of equipment by owner-operators to shippers, and it would appear to be a fair summary of the Commission's most recent pre-1980 Act policy to say that these arrangements will pass muster if the shipper assumes full control of the operation (which does not preclude allowing the owner-operator to choose his own routes, fuel stops, rest stops, and the like, or making him responsible for repairs and maintenance), if the owner-operator is placed on the shipper's rolls as an employee, if the shipper assumes a significant share, if not all, of the characteristic risks and burdens of transportation, and if the evidence as a whole does not make it appear that a subterfuge or device to evade regulation is involved.

2. *Leasing To Regulated Carriers.* The Commission's attitude toward owner-operator leases to regulated car-

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[15] See also *Lovell—Investigation of Operations*, 92 M.C.C. 728 (1963). There, an individual owning several rigs leased them to two shippers and provided drivers who were employed by him but who, the Commission found, became bona fide employees of the shippers. The shippers were found to be in exclusive control of the transportation operation. The Commission emphasized that the "burdens" test of *Drum* had not replaced the "control" test of *Church*, but merely supplemented it. It found that the lessor's assumption of significant financial risks did not remove the lease arrangement from the parameters of private carriage (92 M.C.C. at 734-735).

riers has taken an entirely different course. Such leases were common long before the passage of the Motor Carrier Act in 1935, and the Commission had to deal with their consequences in its grandfather licensing cases.[16] Beginning with *Dixie Ohio Exp. Co. Common Carrier Application*, 17 M.C.C. 735, 737-741 (1939) the Commission applied the test that operations with vehicles leased from owner-operators would be considered those of the lessee-carrier if they were "under its direction and control, and under its responsibility to the general public as well as to the shipper" (17 M.C.C. at 740), whether or not the driver was an employee. After tracing the subsequent development of the case law in this area, the Commission said in *Lease and Interchange, supra*, at 681:

> "It now seems to be accepted that when an authorized carrier furnishes service in vehicles owned and operated by others, he must control the *service* to the same extent as if he owned the vehicles, but need control the *vehicles* only to the extent necessary to be responsible to the shipper, the public, and this Commission for the transportation." (Emphasis added)

The Commission held that, where these tests are met, an authorized carrier may provide service with vehicles owned and operated by independent contractors. It may not, however, "farm out" its authority to others for operations in which it lacks "the elements of direct control over the movement and handling of freight, and of full responsibility to the shipper. . . ." (52 M.C.C. at 682).

In particular, the Commission's report nowhere suggests that owner-operators leasing their equipment to regulated carriers were themselves engaging in for-hire

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[16] A detailed historical review appears in Ex Parte No. MC-43, *Lease and Interchange of Vehicles by Motor Carriers*, 52 M.C.C. 675, 679-683 (1951) (hereinafter cited as *"Lease and Interchange"*). See also *H. B. Church, supra*, 27 M.C.C. at 200-201.

transportation requiring authority from the Commission, except where the lease was a sham and the owner-operator himself was holding out service to the public or controlling the transportation operation to an extent inconsistent with the control required of the regulated carrier. See *American Trucking Ass'ns* v. *United States*, 344 U.S. 298 (1953), upholding the Commission's right to adopt its leasing regulations.

Although the Commission's leasing regulations have undergone a variety of changes in the 30 years since they were first adopted, the requirements of control and responsibility by the lessee have remained constant. They are currently embodied in section 1057.12(d)(1) of the regulations:

> (d) *Exclusive possession and responsibilities.*— (1) The [written] lease shall provide that the authorized carrier lessee shall have exclusive possession, control, and use of the equipment for the duration of the lease. The lease shall further provide that the authorized carrier lessee shall assume complete responsibility for the operation of the equipment for the duration of the lease.

In contrast to leases to shippers, the Commission has not fashioned any presumptions, rebuttable or otherwise, where owner-operators have leased their rigs to regulated carriers.

The Commission's traditionally different approach to leases to regulated carriers is understandable in light of the regulatory environment in which it grew up. As recognized by the Supreme Court in the *Drum* decision, the definitional distinction between private and for-hire carriage grew out of a regulatory environment in which it was considered essential to limit diversion of traffic from the class of regulated carriers upon which most shippers had to rely for service, and the overall public interest was ultimately to be protected by comprehensive

Commission surveillance of the rates and services of licensed motor carriers. As long as the overall transportation service remained subject to regulation, as was the case where equipment lessors dealt only with regulated carriers, there was no likelihood of traffic diversion to the unregulated sector, and abuses could be dealt with through the exercise of the Commission's regulatory authority (including the imposition of leasing regulations) over the regulated carriers.

3. *Conclusions.* Neither the presumptions of for-hire carriage stated in *Church*, *supra*, and of defeasance of control by owner-operators, stated in *Oklahoma*, *supra*, nor the different standards of control for owner-operator leases to shippers vis-a-vis regulated carriers, is required by the language of the Motor Carrier Act. Both presumptions and the differing standards were devised by the Commission in pursuit of regulatory objectives, principally the protection of the regulated sector, at an earlier period in time.

In addition to creating a presumption of for-hire carriage by a lessor of equipment with driver to a private carrier/shipper but not to a regulated carrier, and otherwise maintaining different decisional standards in the two situations, the Commission has from time to time redefined the distinction between for-hire carriage by the lessor and private carriage by the lessee. The *Oklahoma Furniture* case represents an extreme development, where the Commission undertook to make the presumption of for-hire carriage virtually irrebuttable whenever equipment leased to a shipper was driven by the owner-lessor. Earlier cases, in particular *Pacific Diesel*, *supra*, on which the opinion in *Oklahoma Furniture* greatly relied,[17] suggested

[17] In particular, the record in *Pacific Diesel* disclosed a great deal of evidence showing that the lessor rather than the lessee was in actual control of the transportation service, notwithstanding recitals to the contrary in the written lease agreements. The evidence in *Oklahoma Furniture* was altogether different, closely resembling that in *Rayette*.

no such general conclusion, and contradicted the suggestion made in *H. B. Church* that the presumption could be rebutted by showing that the driver of leased equipment was the lessee's employee.[18] Later cases likewise retreated from the extreme position of *Oklahoma Furniture*, even though that decision was upheld by the Supreme Court.

Within quite broad limits, then, we believe the responsibility for drawing the line between private and for-hire carriage has been confided by Congress to the Commission's expert judgment, informed by its appreciation of the regulatory climate, policies, and needs of the time.[19]

Factors Favoring a Reappraisal

In *American Trucking Ass'ns* v. *Atchison, T. & S.F. Ry. Co.*, 387 U.S. 397, 415-16 (1967), the Supreme Court observed that administrative agencies have not merely the right but the affirmative duty to reappraise their regulatory policies periodically in light of changing conditions and circumstances affecting the industries they regulate. The changed conditions which persuade us that a change in policy is now appropriate are of two kinds: those which have occurred in the trucking industry generally since our earlier policies were adopted, and those specifically brought about by the Motor Carrier Act of 1980.

First, it is obvious that the motor carrier industry of today bears little resemblance to the precarious, fragmented, and unstable industry of the mid-1930's, which Congress undertook to rescue by the Motor Carrier Act of

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[18] The operation of equipment by the shipper's employee was offered in *Church as an example* of how the for-hire presumption could be rebutted. As such, we believe other factors relating to control are not, and in fact have not been excluded as methods of rebutting the presumption.

[19] In a subsequent decision, the Supreme Court cited *Drum* as authority for the proposition that "judicial review of . . . [the agency's] expert judgment is necessarily a limited one." *SEC* v. *New England Electric System*, 390 U.S. 207, 211 (1968).

1935. Common and contract carrier trucking has grown into one of the nation's major industries, with enormous revenues and a solidly established position as an indispensible major element in the nation's freight transportation system. At the same time, private carriage has also grown and solidified its position, transporting some 40 percent of the nation's traffic that moves by truck, and actually outnumbering regulated carriers by a ratio of approximately 9 to 1.[20] We do not believe that any action taken here will have a major effect on the overall balance between the regulated and private sectors of the industry.

What is at issue here is the ability of private carriers, like regulated carriers, to improve their overall efficiency by augmenting their fleets with equipment and drivers leased from owner-operators.[21] The Commission's past policy toward such leases has precluded private carriers from using this potential source of fleet augmentation. By changing our policy in this respect, we will open up this additional source of fleet augmentation to private carriers, while at the same time opening up an additional source of revenues to owner-operators, who have been particularly hard-pressed by both the present economic recession and the rapid escalation of fuel prices over the past several years.

No commentor has suggested any reason to conclude that allowing this method of fleet augmentation for private carriers will result in a significant change in the balance between the private and regulated sectors of the trucking industry.[22] Private carriers today are able to aug-

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[20] See U.S. General Accounting Office, "Issues in Regulating Interstate Motor Carriers" (June 20, 1978), at p. 13.

[21] For applicability to regulated carriers, see 49 U.S.C. § 10922 (f)(3). There is no similar statutory provision allowing private carriers to augment their fleets with equipment leased from owner-operators.

[22] It is notable that the major commentors who oppose a policy change in this area (i.e., the Motor Carrier Lawyers Association

ment their fleets by leasing equipment and hiring drivers from different sources,[23] so the ability to use owner-operators, i.e., equipment and drivers leased from a single source, for this purpose will hardly work any major change in the scope of their operations.

Second, the recent enactment of the Motor Carrier Act of 1980 makes it particularly appropriate to reappraise our policy toward leases of equipment with drivers to private carriers, in the light of the many changes made in the regulatory scheme. While Congress did not change the statutory definitions of private and for-hire carriage, it also did not undertake to write the Commission's past interpretations of the definitions into the statute itself.[24] The conclusion we draw is that Congress continues to rely on the Commission, as it has in the past, to establish the boundary line between private and for-hire carriage on a case-by-case basis of adjudication and periodic policy statements.

The Commission's determination of that boundary line has shifted in the past, both in terms of the practical arrangements presented, and in terms of the Commission's articulation of the tests to be applied and the emphasis it has chosen to give to various relevant factors in succeeding cases. We are fully aware of the statutory admonition that we not go beyond the powers vested in us by the Interstate Commerce Act and other legislation.[25] However, we must assume that Congress expects the Commis-

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and the various branches of the American Trucking Associations) confine their comments almost entirely to purely legal argumentation, with little or no discussion of practical consequences.

[23] See note 7.

[24] Compare the 1958 amendment to the definition of private carriage, which was expressly designed to write the Commission's "primary business" test into the statute. See *supra*, footnote 5.

[25] See section 3 of the Motor Carrier Act of 1980, Public Law 96-296, July 1, 1980.

sion to go on bearing the responsibility for drawing the line in light of existing law and regulatory policies.

Congress undoubtedly still wants a distinction to be maintained between regulated and private carriage, and we fully intend to maintain such a distinction. But we find in neither the language nor the legislative history of the 1980 Act any directive to confine private carriage to as narrow a scope as possible, or to employ presumptions no longer justified by present-day realities to interfere with legitimate interests of private carriers to augment their fleets through arrangements not fundamentally inconsistent with their status as private carriers.

The 1980 Act gives evidence that Congress also recognizes both private carriers and noncarrier owner-operators as legitimate branches of the overall trucking industry. Thus, in the interests of the private carrier industry, Congress carved out from the Commission's jurisdiction compensated intercorporate hauling.[26] Similarly, in the interests of the owner-operator industry, Congress expanded the scope of the exempt commodities that owner-operators may transport,[27] and further directed the Commission to allow a simplified fitness-only licensing procedure to grant owner-operators authority to carry food and agriculture-related commodities.[28] While none of the

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[26] 49 U.S.C. 10524(b) and (c), added by section 9 of the Motor Carrier Act of 1980, 94 Stat. 798. Compensated inter corporate hauling (CIH) is not private carriage; it is a limited category of for-hire transportation exempted from coverage under the Act, where the carrier and the shipper are both members of the same "corporate family" as defined in section 10524(c). The carriers benefitting from this new exemption, by and large, are those which have heretofore operated as private carriers. See Ex Parte No. MC-122 (Sub-No. 1), *Implementation of Intercorporate Hauling Reform Legislation* 45 Fed. Reg. 86761 (December 31, 1980).

[27] 49 U.S.C. 10526(a)(6), (11), (12), (13), as amended or added by section 7 of the 1980 Act, 94 Stat. 797.

[28] 49 U.S.C. 10922(b)(4)(E), and (b)(6), added by section 5 of the 1980 Act, 94 Stat. 794; See also 49 U.S.C. 10923(b)(5), and

cited provisions directly affect the question under consideration, they do demonstrate on the part of Congress an acceptance of the continued value of these branches of the trucking industry and a disposition to make provisions for them.[29]

Moreover, the 1980 Act gives evidence that Congress is much less concerned than it formerly was over the possibility of diversion of traffic from existing regulated carriers. New section 10922(b)(2)(B) provides that the Commission shall not find diversion of revenue or traffic from an existing carrier to be in and of itself inconsistent with the public convenience and necessity. It is true, as several commentors point out, that this provision is in the context of admission of new carriers into the regulated industry. It has no direct application to determining the boundary line between private and for-hire carriage. But the avoidance of diversion was never an end in itself. Rather, it was a policy adopted in order to achieve an earlier regulatory objective of maintaining a stable traffic base for a relatively limited number of regulated carriers—an objective which has now been subordinated by Congress in the Act in favor of heightened competition. Since fear of diversion of traffic from regulated to private

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Owner-Operator Food Transportation, 132 M.C.C. 521 (1981), 46 Fed. Reg. 19494 (March 31, 1981).

[29] Furthermore, the Commission in 1978 determined to allow private carriers for the first time to enter the regulated industry, in order to improve the efficiency and economy of their operations, without giving up their private-carrier operations or status. *Toto Purchasing & Supply Co., Inc.*, 128 M.C.C. 873 (1978); see also Ex Parte No. MC-118, *Grant of Motor Carrier Operating Authority to an Applicant Who Intends to Use it Primarily as an Incident to the Carriage of its Own Goods and its Own Nontransportation Business*, 43 Fed. Reg. 33945 (Aug. 2, 1978), and 43 Fed. Reg. 55051 (Nov. 20, 1978). Since Congress was well aware of this important change in Commission policy when it was drafting the 1980 Act, and took no steps to reverse the new policy, we believe it implicitly has Congressional approval.

carriers provided much of the motivation for the Commission's former policy, we think that Congress' lessened concern over traffic diversion can and should legitimately be considered in reappraising that policy.

We also think that the 1980 Act, by reducing the barriers to the entry of new carriers into the regulated industry, has also reduced any incentive such carriers might have to devise subterfuges to remain outside the reach of regulation. See *Pacific Diesel*, *supra*. Since the fear of subterfuges and evasion was a major part of the Commission's motivation in adopting its presumption of for-hire carriage in *Church*, *supra*, of control defeasance by owner-operators in *Oklahoma*, *supra*, and in scrutinizing owner-operator leases to shippers in subsequent cases, the greatly decreased incentives to evade regulation under the 1980 Act strongly suggest a reapprasial of both presumptions.

Finally, we think the new National Transportation Policy (NTP) for motor carriers of property adopted by the 1980 Act[30] calls for a reappraisal of our former policy. Several commentors insist that both the new and the old NTP apply only to regulated carriers, but in view of the over-all scope of the 1980 Act, and of its specific provisions cited above affecting private carriers and owner-operators, we think this contention is untenable.

We believe the whole tenor of the 1980 Act negates any such exclusive concern on the part of Congress for the regulated sector of the trucking industry. Congress certainly wanted to maintain a strong and viable regulated sector, because it knew that many shippers have relied and will continue to rely on that sector for their trucking needs. But we believe that Congress similarly wanted to maintain strong and viable private-carrier and owner-operator sectors, because it equally knew that many ship-

[30] 49 U.S.C. 10101(a)(7), added by section 4 of the 1980 Act, 94 Stat. 793.

pers have likewise relied and will continue to rely on private carriage.

It is with these thoughts in mind that we turn to a redefinition of the distinction between private and for-hire carriage in the context of leases of equipment with drivers to shippers.

Tests to be Employed

We have decided to eliminate the presumption announced in *H. B. Church, supra,* that leases of equipment with drivers to shippers ordinarily give rise to for-hire transportation by the lessor rather than exempt private carriage by the lessee. As noted above, any incentives to indulge in "subterfuges and devices to evade regulation" (*Church*) have been so far reduced under the current regulatory scheme of relaxed entry that no such presumption any longer seems appropriate.

No commentor has suggested any persuasive reason why such a presumption should be retained. The Commission created the presumption in pursuit of earlier regulatory objectives, and can now discard it as obsolete in light of current objectives. We believe the presumption no longer serves any useful purpose. If the circumstances surrounding a particular lease arrangement suggest that a "subterfuge or device" to evade our authority may be present, we have ample means to penetrate any such evasive scheme and ascertain the facts.

For similar reasons, we will remove the presumption raised in *Oklahoma Furniture* that whenever an owner-operator drives his own equipment, there is present the right and power to defeat any supposed right of control that the shipper/lessee may believe exists. There appears to be no reason for the imposition of this presumption on owner-operator-shipper leases, and no commentor specifically addressed its retention. In removing it, the way will be cleared for the consideration of convincing facts tending to show control by the shipper, which facts could not

heretofore vitiate the conclusion of unauthorized for-hire carriage where an owner-operator leased his equipment to a shipper.

We conclude that there is no longer any justification for maintaining different standards in judging lease arrangements with drivers, depending on whether the lessee is a private or for-hire carrier. Disposing of the presumptions just discussed will equate the private sector with the regulated sector, which is free from presumptions that wrest away a carrier's control over an owner-operator. Analytically, the question of whether the provider of equipment with driver under a lease arrangement is simply acting as a traditional lessor of the instrumentalities of transportation, or instead is providing a transportation service itself under the guise of an equipment lease, does not at all depend on the identity of the lessee.

Some commentors assert that the status of a lessor of equipment with driver to a shipper is fundamentally different from that of a similar lessor to a regulated carrier because the former holds his service out to the general public while the latter holds it out only to regulated carriers. This analysis is faulty because it avoids the basic question of precisely *what* it is that the lessor in such cases is holding out.

The crucial element, we believe, is precisely what services a lessor holds out to perform. If he holds out what is in substance a complete transportation service for compensation, then he is acting as common or contract carrier, depending on whether he holds out to the public (or a definable segment thereof) or only to selected shippers. If he holds out only the use of instrumentalities of transportation, *i.e.*, trucks and drivers, then he is not acting as a carrier for hire no matter how widely his service is held out.

The true distinction can best be understood by looking at the situation primarily from the shipper's point of

view. The underlying business reality is that contract and common carriers on the one hand, and lessors on the other, sell different services. The services sold by leasing companies are called factor inputs: vehicles, labor, and closely associated items, such as vehicle maintenance. They do not sell transportation because they do not determine the best way to utilize these resources in order to move freight. A contract or common carrier, however, in addition to providing all the services of a lessor, also combines the resources in order to produce a separate composite product: a transportation service. This requires that, unlike the lessor, the contract or common carrier must possess and provide the key management and organizational functions that characterize a transportation company. These include dispatch, scheduling movements, and general coordination.

From the shipper's point of view, the difference between use of a contract carrier and a lessor (whether an owner-operator or commercially leased equipment and drivers) is the amount of control and responsibility that must be exercised and assumed. If the shipper itself performs the functions necessary to convert the labor and capital inputs into transportation, then it is a private carrier and the arrangement with the lessor of vehicles and/or drivers is a true lease. If the shipper turns over these responsibilities to the lessor, then it is not a private carrier, and its partner in the transaction is a for-hire carrier. The key to the distinction, both in the marketplace and in law, is the issue of control. To effectively perform the transportation service, the carrier (private or for-hire) must have control over the major factor inputs (labor and vehicles). Thus, a truck-leasing firm, including one that undertakes for a fee to service and maintain the leased equipment, is clearly not a for-hire carrier unless its service goes considerably farther and encompasses the actual provision of an organized transportation service.

Another reality of the marketplace is that the typical owner-operator, that is, the individual who owns a single vehicle which he also drives, with no further organization or employees except perhaps a substitute driver, is ordinarily not in a position to offer a shipper a complete transportation service comparable to that typically offered by a common or contract carrier. The functions of dispatching, scheduling, and coordination of freight shipments are simply beyond his capabilities. Even in his recognized role as transporter of exempt agricultural commodities, the owner-operator typically finds it necessary to work through such intermediaries as brokers, who perform the complementary functions of a transportation service he is not able to provide.

Thus, a shipper that uses the services of an owner-operator will typically have to perform for itself those additional functions which transform the capital and labor inputs (vehicle and driver) into a total transportation service, simply because the owner-operator will not be capable of performing them satisfactorily.[31] If the shipper is unprepared or unwilling to perform these integrative functions for itself, then it will turn to a contract or common carrier, whose services are readily available. We do not see any significant likelihood that individual owner-operators will be able to offer shippers services that will be functionally equivalent to, or competitive with, the services of authorized common or contract carriers. Owner-operators may well be able to offer services which cost less than those of common or contract carriers, but only because they will be fundamentally different, less complete services, *i.e.*, the provision of factor inputs which

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[31] This is equally true whether or not the shipper already has a fleet of trucks which it operates with employee drivers. If it does, it will presumably already be performing the integrative and management functions typical of a carrier; if it does not, either it will have to employ additional management personnel to perform these functions, or they will have to be added to the duties of existing management personnel.

the shippers themselves will have to organize and fashion into a transportation service.

Authorized carriers which today use the services and equipment of owner-operators must add their own services of dispatching, scheduling, and general coordination, prior to selling the resultant transportation service to shippers. If owner-operators are permitted to lease their equipment and driving services directly to shippers, the shippers will have to undertake the functions currently performed by the authorized carriers. Whether the latter arrangement will be economically attractive to a shipper will depend simply on whether his cost for performing these functions is greater or less than the authorized carrier's charge for performing them.

This form of product competition, made possible by removing the regulatory obstacles to the use of owner-operator services by shippers and private carriers, will in our judgment further the objectives of the Motor Carrier Act of 1980, particularly in the promotion of competitive and efficient transportation services in order to meet the needs of shippers, receivers, and consumers; to allow a variety of quality, price, and service options to meet changing market demands and the diverse requirements of the shipping public; and to allow the most productive use of equipment and energy resources—the last because owner-operators will have a broader market for their services and private carriers will have an additional source of fleet augmentation to meet their changing transportation needs.

In contrast to individual owner-operators, large equipment leasing companies are typically quite capable of performing the additional management functions which turn the capital and labor inputs into a complete transportation service. Thus, we intend to scrutinize carefully those leasing arrangements with drivers where the lessor obviously has the capability of providing the key organiz-

ing and management functions that characterize a transportation company, particularly in situations where the lessee's ability to perform these functions for itself may be in question.

What remains, therefore, is the test or tests to be applied in drawing the necessary legal distinction between for-hire carriage by the lessor of equipment with driver vis-a-vis regulated or private carriage by the lessee, depending on whether the lessee is a regulated carrier or shipper. Our tests will naturally focus on the factors of *control* and *responsibility* and on the critical organizing and management functions which transform raw factor inputs into an integrated transportation service. Control is of primary importance to us because without assured control, the lessee of equipment with driver cannot perform the critical organizing and management functions. Responsibility follows from control, and the lessee's acceptance of responsibility serves to verify the reality of its control. The organizing and management functions, of course, are the very elements that separate the mere provision of factor inputs from the performance of an integrated transportation service.

We will not restrict our inquiry to the formal recitals of the lease agreement, but will—as in past—examine all surrounding facts and circumstances and the actual conduct of operations under the lease to ascertain if the true substance of the arrangement is in accord with that recited in the formal agreement.

Our renewed emphasis on control and responsibility does not mean we are no longer concerned with "the characteristic burdens of transportation"—the corollary test used to determine control in *Church*, articulated in *Drum*, and followed in later Commission cases.[32] The con-

[32] In this respect, as is evident, our thinking relative to control has undergone refinement since the publication of our original notice of proposed policy statement.

siderations inherent in this test will continue to be taken into account, not as a separate test, as suggested in *Drum*, but rather as part of the examination of the greater and primary issue of control. Performance of the critical organization and management functions that create a true transportation service, and the exercise of control necessary in order to do so, are in our view the two most important "characteristic burdens of transportation". Moreover, additional characteristic burdens flow from the responsibilities the lessee must accept, the most important being liability to the public for injuries caused by the transportation operation, responsibility for compliance with safety regulations, and risk of loss or damage to the cargo, all as discussed in greater detail below.

Our present view of what the term "characteristic burdens of transportation" encompasses is not the same as that utilized in the Commission's earlier decisions. Specifically, we do not see great relevance in the degree of predictability either of the cost of transportation to the lessee-shipper, or of the compensation of the lessor-owner-operator. These and other questions concerning the form and calculation of payments by the lessee to the lessor are matters of bargaining between the parties, and in most cases will have little bearing on which of the parties is in substance providing the transportation service, as analyzed above.

Similarly, we do not see the relevance of which party to the transaction bears the risk of idleness or non-remunerative use of equipment. This is undoubtedly a burden, but not one necessarily characteristic of a transportation service. A shipper can clearly shift this risk from itself to an equipment-leasing company, without in any way relying on the latter to perform the key organizational and management functions of a transportation service; and it has not been suggested in such cases that the lessor of equipment without drivers, merely by assuming this risk, becomes a for-hire carrier. The pre-

vailing method of compensating owner-operators who lease to regulated carriers—payment of a fixed percentage of the revenues earned by the carrier for its use of the leased equipment—puts the risk of idleness or nonremunerative use (empty backhauls) squarely on the owner-operator, yet this has not been treated as making him a for-hire carrier.[33] We are convinced this risk is more properly a matter for bargaining between the parties, and that appropriate adjustments in price will be made depending on which party bears the risk of idleness or nonproductive use of equipment, or how they share that risk, without the necessity of drawing inferences as to which party is in substance performing the transportation service.

Accordingly, while we will take all relevant factors into account, we intend to focus on control, responsibility, and the performance of key organizing and management functions of a transportation service as the critical elements in determining who is performing the service, and in characterizing the type of carriage being performed. Where control, or responsibility, or performance of the key organizing functions is unclear, we will endeavor, without introducing any presumptions or preconceptions, to ascertain where each of these factors predominantly lies. If we find that the lessor is in practice performing the functions characteristic of a transportation service, we will conclude that that lessor is performing an unauthorized common or contract carrier service. If the evidence is unclear or in conflict, we will attempt to see where the factors predominantly point.

As to the degree of control and responsibility that must be exercised by the lessee to show that it rather than the lessor is performing the transportation service, we will adopt the test stated for similar leases in the regulated

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[33] The Commission's original leasing regulations outlawed compensation based on a percentage of revenues, 52 M.C.C. at 726, but this provision was subsequently repealed.

sector in *Lease and Equipment, supra*, 52 M.C.C. at 681, and quoted above at p. 14:

> . . . [W]hen an authorized carrier furnishes service in vehicles owned and operated by others, he must control the *service* to the same extent as if he owned the vehicles, but need control the *vehicles* only to the extent necessary to be responsible to the shipper, the public, and this Commission for the transportation. (Emphasis added)

When a private carrier furnishes service in vehicles owned and operated by others, it must control the service to the same extent as if it owned the vehicles, but need control the vehicles only to the extent necessary to be responsible to the public and the Department of Transportation.

The above are the minimum requirements that must be met in a lease of equipment and driver to a shipper in order to have the arrangement viewed as private carriage conducted by the shipper-lessee. If actual operations conducted under the lease accurately reflect our requirements, a presumption will arise that the transportation being performed is private carriage controlled by the shipper. This presumption may be rebutted with a showing that actual operations, in any respect, tend to weaken the control and responsibility required of a shipper-lessee when conducting transportation operations with equipment and drivers leased from a single source. Appendix B contains sample lease language that meets the minimum requirements and establishes the presumption. The preceding requirements are particularized as follows:

(1) The lease agreement must provide, and the surrounding facts must reflect, that the leased equipment is exclusively committed to the lessee's use for the term of the lease,[34] for any purpose consistent with the provisions

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[34] This implies that the lease must have some definite and ascertainable term, which will be discussed *infra*. This requirement is

of the lease. This requirement does not preclude the lessor's own use of the equipment during periods of the lease when it is not being utilized by the lessee. We see no reason why a lessee cannot sublease the equipment to a third party if the lease so permits. We caution, however, that a private carrier lessee may presently not sublease to an authorized carrier for periods less than thirty days. This issue is the subject of a pending proceeding docketed in Ex Parte No. MC-43 (Sub-No. 12), *Leasing Rules Modifications* (46 Fed. Reg. 15300, March 5, 1981).

(2) The lease agreement must provide, and the surrounding facts and actual operations must show, that the lessee has exclusive dominion and control over the transportation service conducted by it with the leased equipment during the term of the lease. It is not inconsistent with such control over the transportation service to allow the driver of the equipment to select routes, fuel stops, rest stops, repair stops, and perform other ministerial matters relating to control of the vehicle. It is inconsistent with his status as a simple lessor, however, to delegate to him managerial elements of control over the transportation service provided.[35]

(3) The lessee must maintain public liability insurance or otherwise accept responsibilty to the public for any injury caused in the course of performing the transportation service conducted by it with the equipment during

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not inconsistent with a provision making the lease renewable by either party, or terminable by either or both parties on specified notice. It is similarly not inconsistent with the lessee's full and exclusive right of use to provide in the lease that the lessor may use the equipment for his own purposes at such times during the period of the lease as the lessee has no use for it.

[35] An owner-driver may perform such functions in loading and unloading as an employee would ordinarily perform, consistent with industry practice, but he should not be called on to perform such managerial functions as the hiring of additional employees for loading and unloading.

the term of the lease. To this end, the equipment must display appropriate identification showing operation by the lessee during the performance of such transportation. The ultimate liability (including any liability for damages in excess of insurance policy limits) will remain on the lessee.[36] This will be a significant protection to the public, since both a shipper/private carrier and a regulated carrier perform essentially the same service, and should be similarly responsible for public injury. As a practical matter, shippers will generally be better able both to afford adequate insurance coverage and to respond in damages than a typical owner-operator.

(4) The lessee must accept responsibility for, and bear the cost of, compliance with safety regulations during performance by it of any such transportation service. This is not inconsistent with a requirement that the driver pay any traffic fines he may incur, but responsibility for infractions over which the lessor has no control should remain on the lessee, who, in an overload situation, for example, controls the amount of cargo loaded as a managerial element of the transportation service.

(5) The lessee must bear the risk of damage to the cargo, subject to any right of action it may have against the lessor for the latter's negligence. This could be covered by cargo liability insurance or other means, such as self-insurance. This means that a private-carrier lessee—since the driver is merely its agent and the cargo never leaves its possession—cannot look to the lessor to bear the typical insurer's liability of a carrier.[37]

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[36] The lessee's acceptance of responsibility to the public is not negated by any right of action it may have against the owner-operator for injury caused by the latter's negligence.

[37] A common carrier bears an insurer's liability to its shipper in most circumstances, subject to reasonable limitation by tariff provision; a contract carrier's liability to its shipper is a matter of contract. A clause in a lease agreement making and equipment lessor liable for cargo loss would thus tend to indicate either com-

(6) The term of the lease must be for a minimum period of 30 days. We will focus on the standard of control used in owner-operator leases to private carriers, as we have in the past concerning such leases to regulated carriers. It would be inconsistent to permit private carriers to engage owner-operators for less than 30 days, while requiring a 30 day minimum of regulated carriers as an indicator of control. A lesser minimum period would also confer an economic tool upon private carriers, which could be used to the detriment of for-hire carriers.

The foregoing are conditions that are normally assumed by authorized carriers in holding out their service to the public. We believe they are indispensable to show that the lessee rather than the lessor of equipment with driver is performing the characteristic functions of a carrier. In including these conditions but excluding others (which may be viewed by some commentors as indispensable), we believe we are acting "well within the range of the responsibility Congress assigned to the Commission." See *United States* v. *Drum*, *supra*, 368 U.S. at 385.

There remain a number of other features of lease agreements that are not conclusive on the issue of control, but may nevertheless be entitled to weight in characterizing leasing arrangements which are presented as private carriage. We list the following, without intending to exclude consideration of other features which have been discussed in past cases or may be found to be significant in future ones:

(1) *Whether the lease agreement is in writing.* This is not an indispensable element of a valid contractual agreement, absent some applicable state law to that effect, and we have no authority to impose it on private car-

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mon or contract carriage; a clause negating such liability by the lessor would tend to negate common carriage, though not necessarily contract carriage.

riers as we have in the case of regulated carriers which lease equipment from owner-operators or other carriers.[38] However, the best evidence of the minimum requirements and other provisions entitled to weight in determining whether a leasing arrangement is private carriage is a written lease. It follows that we will subject oral leases to more careful and detailed scrutiny than written leases.

(2) *Whether the lease is for round trips.* One-way leases may facially be inconsistent with the exclusive commitment requirement, and with performance by the lessee of the key organizing and management functions which distinguish a true transportation service from the mere provision of instrumentalities. However, as we observed earlier, a provision in a lease agreement allowing the lessor to use the equipment for his own purposes during the period of the lease when the lessee has no need for it would not necessarily be inconsistent with the lessee's full and exclusive right of use. Thus, where the lessee has freight moving in one direction only, we do not believe that the concept of exclusive commitment is compromised or mitigated where, consistent with the terms and provisions of the prime lease, the lessor executes a concurrent and more or less complementary lease for backhaul purposes and repositioning of equipment.

(3) *Whether the driver becomes the lessee's employee.* A requirement to this effect was considered but never imposed by the Commission when it was first reviewing owner-operator leases to regulated carriers.[39] On the other hand, employment of owner-operators has been perceived as being a requirement in the case of their leasing to shippers, in order to avoid a finding of unauthorized

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[38] 49 C.F.R. 1057.11(a).

[39] See *Dixie Ohio Exp. Co. Common Carrier Application*, 17 M.C.C. 735 (1939).

for-hire carriage by the lessor.[40] The result has been to preclude the latter type of lease, since very few owner-operators have been willing to give up their status as independent contractors. Although acceptance of such status is certainly confirmatory evidence that the lessee exercises exclusive possession, control, and dominion of the transportation service, we believe an owner-operator can maintain his status as an independent contractor without necessarily extending the scope of his holding out beyond the use of his equipment and his own services as a driver, or negating the lessee's exclusive possession and control. Any intimations to the contrary in our past decisions are expressly negated.

(4) *Whether the equipment is sometimes driven by a person other than the owner-operator or someone selected by him.* While not essential, this is obviously a factor tending to show that the lessee is in full and exclusive command of the transportation operation.

(5) *Whether the lease is of tractor only, or of tractor and trailer.* The lessee's ownership of the trailers pulled by leased tractors tends to show it as bearing a burden of transportation, though not one of the essential ones (see our earlier discussion).

(6) *Who assumes the risk of loss or damage to the equipment, and who pays for fire, theft, and collision insurance thereon.* This is essentially a matter for bargaining between the parties. Requiring the owner-operator-lessor to bear these risks and costs is not necessarily inconsistent with performance of the carrier role by the lessee; but if the lessee agrees to bear these risks and costs, it tends to strengthen its assertion of control.

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[40] No Commission decision has flatly required this, but it has not escaped attention that the only cases of owner-operator leases to private carriers which were upheld by the Commission as constituting private carriage have in fact been those where the owner-operators became employees. See, e.g. *Ontario Company—Declaratory Order*, 112 M.C.C. 211 (1970).

(7) *Whether the lessee pays or reimburses the driver for such expenses as fuel, oil, tolls, en-route repairs, and loading/unloading charges.* A fixed allowance per mile covering some or all of these expenses is not inconsistent with a true lease situation. See *Rayette, supra.* Neither is a negotiated lump-sum payment covering some or all such expenses. If the lessee specifically pays or reimburses them, however, that fact is further evidence that it performs and controls the transportation function.

(8) *Whether the lessor is required to repair and maintain the equipment.* Equipment leasing companies often offer this service, for a fee, in connection with long-term leases, without any implication of for-hire carriage on their part. The same absence of implication should apply to owner-operator lessors, regardless of whether they charge a fee for this service.

(9) *Whether the lease provides for some fixed minimum payment, regardless of use.* A provision for a minimum payment is relevant but not essential. Although the risk of nonutilization was a factor stressed in *Drum,* we agree with the Administrative Law Judge's assessment in *Rayette* that this factor is purely theoretical where the equipment is kept busy, and thus is not a significant burden of transportation which can be of assistance in resolving the primary issue of control.

(10) *Whether the lessee is assisting the lessor finance the equipment, and/or whether it holds legal title in trust for the lessor.* This is a strong factor showing assumption by the lessee of a "burden of transportation", which helps to answer the control issue. See *Rayette, supra.*

Conclusion. As stated at the outset, the foregoing is not intended to be an exhaustive listing of all the factors which have been or may be found to be relevant to the determination of whether a particular private operation conducted with leased singly-sourced equipment and drivers is in fact private carriage. We think, though,

that the foregoing factors reasonably and clearly indicate how we will deal with other factors that may tend to establish who has control. We repeat that the foregoing 10 factors are peripheral, and that we expect to focus most of our attention on the six essential elements of a lease arrangement discussed earlier.

We are well aware that the parties to such arrangements want practical assurances that their operations will not be suddenly overturned on some technicality or other. Appendix B contains sample lease language which meets the minimum requirements for control where a shipper leases equipment and drivers from a single source. Properly executed, a lease form containing this language raises the presumption of a private carriage conducted by the lessee. Our inquiries will ascertain whether the actual operations are an accurate reflection of the language set forth in the lease. We believe that the discussion in this policy statement will give all affected parties sufficiently clear guidelines so that they can order their affairs with confidence.

Further Arguments by Opponents

The opponents of our proposed policy statement make a number of arguments that are neither procedurally nor directly related to the issue of where the line should be drawn between private and for-hire carriage. Several of these arguments suggest that owner-operators will not really benefit from our proposed policy change. We cannot help noticing, however, that these arguments come not from the owner-operators themselves but from members and representatives of the regulated industry, whose interests here are rather plainly opposed to those of the owner-operators.

1. *Master Licensing.* A major contention of certain commentors is that adoption of the proposed policy state-

ment would be tantamount to a form of master licensing prohibited by the Motor Carrier Act of 1980.[41]

These commentors misunderstand the nature of our policy statement. The master licensing prohibition is designed to prevent the Commission from announcing in a rulemaking proceeding general findings of public convenience and necessity which would not thereafter be subject to reexamination in any subsequent individual licensing proceeding. The Congressional prohibition was in response to specific Commission proposals of this type; see, for example, *Chemical Leaman Tank Lines, Inc.* v. *United States*, 368 F. Supp. 925 (D. Del. 1973). The statutory ban is expressly limited to Commission licensing proceedings. Our instant proposal is not a licensing proceeding, however, and makes no findings of public convenience and necessity. It simply advises the public in general terms when we believe our regulatory jurisdiction will ordinarily be triggered. As the previous discussion makes clear, owner-operators will not under our policy statement be able to operate in the same manner as licensed carriers.

2. *Absence of Existing Protection for Owner-Operators.* Many commentors correctly point out that owner-operators who lease to private carriers will not be covered by the various protections of the so-called "truth-in-leasing" regulations.[42] This effect, they contend, is con-

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[41] P.L. 96-296, 94 Stat. 793, § 5(b)(3) and § 10(a)(6); 49 U.S.C. 10922(b)(3) states "The Commission may not make a finding relating to public convenience and necessity under paragraph (1) [of subsection 10922(b)] which is based upon general findings developed in rulemaking proceedings." 49 U.S.C. 10923 (a)(6) makes essentially the same language applicable to applications for contract carrier permits.

[42] 49 C.F.R. 1057.12; Ex Parte No. MC-43 (Sub-No. 7), *Lease and Interchange of Vehicles*, 131 M.C.C. 141 (1980), *aff'd sub nom. Global Van Lines, Inc.* v. *I.C.C.*, 627 F.2d 546 (D.C. Cir. 1980).

trary to congressional concern and to the statute itself. We disagree.

Owner-operators need not lease to private carriers unless they wish to do so. In many cases, the protections which our regulations accord owner-operators when they lease to regulated carriers may encourage them to retain their association with the latter.

We believe owner-operators should be given the choice of leasing their services and equipment in either a regulated or an unregulated environment. In return for relinquishing the truth-in-leasing protections enjoyed while under lease to a regulated carrier, the owner-operator can negotiate his own protective arrangements with the private carrier. In the final analysis, however, we have no jurisdiction to impose on owner-operator leases to private carriers the regulatory protections which owner-operators now enjoy when leasing to regulated carriers.

The fuel surcharge issue is similarly tendered by opponents of the proposal as an existing owner-operator benefit which would be lost if this policy is effected. The fuel surcharge program[43] was designed to compensate owner-operators for their increased costs of fuel by means of a surcharge on the gross transportation charges which must be remitted by the carrier to the owner-operator. The surcharge program has been eliminated, with compulsory mileage-based compensation taking its place.[44] As with the truth-in-leasing protections, we have no jurisdiction to impose a fuel payments program upon private carriers. However, with an opportunity to negotiate leasing charges directly with individual shippers,

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[43] Ex Parte No. 311 (Sub-No. 1), *Expedited Procedures for Recovery of Fuel Costs*, decision served June 4, 1979.

[44] Ex Parte No. 311 (Sub-No. 4) *Modification of the Motor Carrier Fuel Surcharge Program* 46 Fed. Reg. 50070 (October 9, 1981), 47 Fed. Reg. —— (————, 1982).

owner-operators can ensure that their fuel costs are considered, thus obviating the need for a supplemental fuel payment.

3. *Compensated Intercorporate Hauling.*—Our original proposal noted that in a related proceeding, we concluded that compensated intercorporate hauling (CIH) operations performed by a corporate subsidiary established for the specific purpose of providing for-hire transportation solely for its parent and/or corporate affiliates are exempt under the Motor Carrier Act.[45] This conclusion was affirmed in the adoption of final rules in that proceeding.[46]

A commentor has questioned whether owner-operators may lease directly to a separately-incorporated subsidiary engaged solely in CIH operations pursuant to the rules set forth in Ex Parte No. MC-122 (Sub-No. 1).

The unquestionable intent of Section 9 of the 1980 Motor Carrier Act is to exempt intercorporate hauling from the Commission's regulatory jurisdiction, once the limited formalities of notice and publication are complied with, to the same extent as private carriage has heretofore been exempted. While we have no jurisdiction to regulate intercorporate hauling, we do retain our authority to determine what constitutes intercorporate hauling within the confines of the statute.

A corporate transportation subsidiary which handles the transportation requirements of its parent or affiliates is effectively a private carrier. We therefore see no basis

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[45] Ex Parte No. MC-122 (Sub-No. 1), *Implementation of Intercorporate Hauling Reform Legislation* 45 Fed. Reg. 45526 (July 3, 1980). Compensated Intercorporate Hauling was established by Section 9 of the Motor Carrier Act, and is exempt from our jurisdiction once the ministerial formality of notice (and subsequent publication) is complied with.

[46] Ex Parte No. MC-122 (Sub-No. 1), *Implementation of Intercorporate Hauling Reform Legislation*, 45 Fed. Reg. 86761 (December 31, 1980).

for precluding legitimate leasing by owner-operators or others to intercorporate haulers, regardless of whether they are separately incorporated. We stress, however, that a corporate subsidiary wishing to engage in exempt compensated intercorporate hauling by leasing vehicles and driver services from owner-operators must assume the characteristic burdens of transportation in exactly the same manner as does a private carrier operating without a transportation subsidiary. If a transportation subsidiary leased vehicles and driver services from owner-operators, but did not assume the characteristic burdens of transportation, the owner-operator, and not the transportation subsidiary, would be rendering the transportation service to the corporate family. Because such an arrangement would not fulfill the requirements of section 10524(b) that the transportation for the corporate family be "provided by a person who is a member of a corporate family", the arrangement would constitute provision of for-hire transportation, subject to our jurisduction, and not exempt private carriage.

4. *Highway Safety.* Several commentors assert that adoption of our proposal will be detrimental to highway safety. They point to expressed Congressional concerns for the continued safety of motor carrier operations,[47] concerns which resulted in the enactment of sections 29 and 30 of the Motor Carrier Act of 1980.[48] Commentors claim that allowing owner-operators to enter into short-term leases (i.e., those of less than 7 days' duration) with shippers would bring the owner-operators within an

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[47] See H.R. Rep. 96-1069, 96th Cong., 2nd Sess., pp. 6, 41-43.

[48] Section 29 requires filing evidence of insurability (bond, insurance policy, or other security approved by the Commission) prior to the issuance of a certificate or permit. Section 30 establishes minimum levels of financial responsibilty for persons engaged in the motor carriage of property utilizing vehicles having a gross vehicle weight of 10,000 pounds or more. 49 U.S.C. 10927(a)(1); 94 Stat. 820.

exception to the Federal Motor Carrier Safety Regulations [49] concerning the qualifications of drivers. Carriers which utilize drivers falling within the exception for "intermittent, casual, or occasional drivers" are not required to investigate those drivers' qualifications or their past safety violations, or to review their driving records annually.[50] Commentors contend that to allow private carriers to take advantage of this exception would defeat the beneficial results sought to be obtained by Congress in enacting sections 29 and 30, and flatly assert that private carriers using owner-operators on an "intermittent, casual, or occasional" basis will be prone to a higher incidence of highway accidents.

Insofar as leases to private carriers must be of 30 days duration, at minimum, the same as for regulated carriers, these arguments are without merit. Nevertheless, we must emphasize that the primary jurisdiction over motor vehicles safety regulation is vested in the Bureau of Motor Carriers Safety of the Department of Transportation, and requests for any regulatory changes should be addressed to DOT.

5. *Leases by Commercial Lessors.* Many commentors insist that commercial equipment lessors cannot be excluded from the scope of our policy statement and that any attempt to do so would arbitrarily discriminate between owner-operators and commercial lessors. Other commentors assert that leases of equipment with drivers by commercial lessors to private carriers would automatically constitute for-hire transportation by the commercial lessors for which authority would be required.

Our earlier analysis of the fundamental distinction between leasing and for-hire carriage convinces us that commercial lessors, like owner-operators, may lease

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[49] 49 C.F.R. Part 396.

[50] 49 C.F.R. § 191.63.

equipment with drivers to shippers without becoming for-hire carriers. The same principles governing the distinction between private and for-hire carriage would be equally applicable to leasing companies and owner-operators. Many commercial leasing companies, if they supplied drivers for the equipment they leased, might want to take the final step and offer their customers a full transportation service. For this they would of course require Commission authority.[51] As we pointed out earlier, the large commercial leasing company that leases equipment with drivers to private carriers has a greater potential for entering the field of for-hire carriage than does the typical owner-operator. We expect to scrutinize such leasing arrangements with care in light of the typically greater ability of commercial lessors to engage in for-hire carriage.

6. *Leases by Authorized Carriers.* Regulated carriers are precluded from leasing equipment, with or without drivers, to private carriers or shippers under most circumstances by Subpart E of the leasing regulations.[52]

As a matter of legal analysis, however, we see no reason why authorized carriers cannot lawfully engage in the leasing of equipment with drivers to private carriers

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[51] See, for example, *Pacific Diesel Rental Co.—Investigation of Operations*, 78 M.C.C. 161 (1958), a case in which the Commission held that the "lessor" was, in fact, engaged in for-hire carriage, and which would probably be decided the same way under our proposal.

[52] 49 C.F.R. § 1057.41. This section sets out four exceptions to the general ban on authorized carrier leasing to private carriers or shippers: (a) Leases with or without drivers are permitted for transporting newspapers or for local cartage within a commercial zone (49 U.S.C. 10526(a)(7) and (b)(1); (b) leases with drivers are permitted when the carrier's certificate or permit specifically so provides; (c) leases without drivers are permitted where the cargo is moving on railroad bills of lading; and (d) leases without drivers are permitted where approval of the rental contracts has been obtained from the Commission.

just as other lessors can. On the other hand, regulated carriers obviously have the capability of performing those functions which characterize a for-hire transportation service, and indeed it is just those functions that they hold themselves out to the public as being ready, willing, and able to perform. Were authorized carriers allowed to lease equipment with drivers to private carriers, the former would have to make it very clear to a prospective lessee that it was *not* undertaking to perform these management functions with respect to the leased equipment and drivers. If it did not in fact perform them, the arrangement could perfectly well be held a *bona fide* lease and valid private carriage by the lessee, assuming our six criteria described above were met.

In such circumstances, it would be solely the bar of the existing regulation that would preclude an authorized carrier from leasing equipment with drivers to a shipper or private carrier.

Accordingly, we will institute a proceeding to determine whether Subpart E of the leasing regulations should be repealed or modified to bring it into line with the policy adopted here.

7. *Tax Status of Owner-Operators Leasing to Private Carriers.* Some commentors assert that owner-operators who lease to private carriers under our proposal would be treated as employees for tax purposes, because of the degree of control the private carrier would have to exercise to establish true private carriage. This argument has little relevance to our regulatory functions. For general legal purposes, we held long ago that a regulated carrier can carry on its service with equipment leased from owner-operators as independent contractors, and it is our understanding that owner-operators are not typically treated as employees for tax purposes when they lease to regulated carriers. *Lease and Interchange, supra,* 52 M.C.C. at 681. The tests we will apply henceforth will

require no greater degree of control where the lessee is a private carrier than where it is a regulated carrier, and we have specifically repudiated any past implication that an owner-operator-lessor leasing to a private carrier must become an employee.[53]

8. *Definition of "Private Carrier"*. Some commentors are concerned that our use of the term "private carriers" in the title of this proceeding implicitly restricts the applicability of this policy to those shippers with existing private carriage fleets. This is not our intent. A private carrier is in essence a shipper or manufacturer which transports its own goods.[54] We see no distinction between use of this policy to augment existing private carriage operations or to inaugurate new private carriage service. Thus, where the term "private carrier" has been used, the word "shipper" may be substituted so as not to preclude the lease of equipment and drivers to those shippers without existing private carriage operations.

Environmental and Energy Considerations

As noted in the proposed policy statement, it is expected that the proposed action will "improve operating efficiencies, reduce empty mileages, and increase productivity of revenue equipment, thus contributing to the conservation of energy resources". In an analysis prepared for the Federal Energy Administration,[55] the Charles River Associates, Inc., found that restrictions on leasing equipment to other carriers and restrictions on mixing exempt, contract, private, and common carriage could cause unnecessary additional empty backhauls, vehicle mileage, and fuel consumption. Although the energy

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[53] See pp. 16-17 and 36-37, also n. 18.

[54] 49 U.S.C. § 10102(14) defines "motor private carrier".

[55] U.S. Federal Energy Administration, "Potential Fuel Conservation Measures by Motor Carriers in the Intercity Freight Market", Vol. 1, March 1977, Washington, D.C.

impact of allowing owner-operators to lease equipment to private carriage has never been specifically examined, it is expected that the proposed action will reduce empty backhauls, net vehicle mileage, and fuel consumption. Attendant to the reductions in vehicle mileage will be a slight reduction in truck-related accidents, noise, and air pollution. No other energy consumption or environmental impacts are expected.

This analysis presumes that owner-operator flexibility will not be unduly restricted in their agreements with private carriers. Such contractual restrictions could cause operating inefficiencies and increased energy consumption.

Decided: February 9, 1982.

By the Commission, Chairman Taylor, Vice-Chairman Gilliam, Commissioners Gresham and Clapp. Commissioner Gresham concurred in part and dissented in part and reserves the right to submit a separate expression which will be issued in a notice.

JAMES H. BAYNE
Acting Secretary

[SEAL]

APPENDIX A

Comments received in Ex Parte No. MC-122 (Sub-No. 2)

Individuals

Jim Sanot	Easton, PA
C. Tim Stoughton	Lancaster, OH
James W. Blackburn	N. Wilkesboro, NC
Ron Rebideau	Plymouth, VT
Ray Anderson	Greenville, OH
Randy E. Anderson	Lancaster, OH
Troy A. Hill	Federal Way, WA
Thomas J. & Joanne T. Kennedy, Jr.	Hackettshown, NJ
Lawrence E. Dellinger	Arlington, VA
R. Terry Stoughton	Not given
Phil L. Noland	Not given
Louis W. Scruggs	Not given
Eric E. Matchette, III	Mission Hills, KS
Jim Shaw	Salt Lake City, UT
Les Zimmermann	Youngstown, OH
Joe Hess	Greenville, OH
Alfred E. Bakos	Porter, IN
Tony A. Taylor	Bristol, TN
Donald A. Hayes	Merrillville, IN
Ted Obolsky	Passaic, NJ
Brian Obolsky	Passaic, NJ
Bill Hodge	Holdmdel, NJ
Ed Koch	E. Rutherford, NJ
Jeff Mauksa	Passaic, NJ
John J. Dean	Passaic, NJ
Robert J. Dudek	Fairfield, NJ
Mark Thaugas	Holmdel, NJ
Richard Deview	Wayne, NJ
James Cook, Jr.	Jeffrey, NH
Perry D. Daniels	Harrisonville, PA
Clara L. Bowen	Greenville, NC

Ronnie G. Black	Birmingham, AL
David & Catherine Fredericksen	Neenah, WI
Ray McCallister	Sandy Lake, PA
Frank Haines	Connellsville, PA
Billy C. Usery	Guntersville, AL
Gail A. Dowds	Augusta, GA
Robert Shaw	Portland, ME
Robert E. Kramer	Rice's Landing, PA
Warren R. Shafer	Columbus, OH
Bob Cain	Walla Walla, WA

Shippers/Private Carriers

Monsanto Company
Mills & Nebraska Lumber
Dayco Corporation
Speciality Auto Sales, Inc.
Midland Cooperatives, Inc.
Northwestern Steel and Wire Company
TRW, Inc.
Onan Corporation
Nucor Corporation
Surrette Storage Battery Co., Inc.
Cook Paint and Varnish Company
B-D Oil Company
Anchor-Hocking Corporation
Hunt-Wesson Foods, Inc.
Slaughter Brothers, Inc.
J.R. Industrial Corporation
J.C. Penney Company, Inc.
Hill-Rom Company, Inc.
The Pillsbury Company
Boise Cascade Corporation
Union Camp Corporation
Exide Corporation
Comet Rice, Inc.
Geo. A. Hormel & Co., Oscar Mayer & Co., and The Rath Packing Company (jointly)

Nekoosa Papers, Inc.
Chattanooga Brick and Tile, Inc.
Amoco Oil Company
Petrolane, Inc.
Black & Decker Mfg. Co. (Appearance at oral hearing only)

Carriers

Ellerbrock Trucking, Inc.
Silvey Refrigerated Carriers, Inc./Rand Leasing Corporation, Inc.
Ranger Division, Ryder Truck Lines, Inc.
Schilli Motor Lines, Inc.
Louis J. Capolino Trucking
Old Dominion Freight Lines, Inc. & Deaton, Inc. (jointly)
Bowman Transportation, Inc., Floyd & Beasley Transfer Co., Inc., Bruce Johnson Trucking Co., Inc., and R.J. Taylor and G.G. Taylor Co. (jointly)
Mason & Dixon Lines, Inc.
Chandler Trailer Convoy, Inc.
Watkins Motor Lines
Cooper Motor Lines, Inc.
East Texas Motor Freight Lines, Inc.
Blalock Truck Lines, Inc., F.J. Boutell Driveway Co., Inc., J.N. Carr Transport, Inc., L-J-R Hauling, Incorporated, Milk Tank Lines, Inc., National Transportation Services, Inc., & Underwood & Weld Co., Inc., (jointly).
Crete Carrier Corporation, Shaffer Trucking, Inc., and Sunflower Carriers, Inc. (jointly).
C & H Transportation Co., Inc., Frank Bros. Trucking Co., and J. H. Rose Truck Line, Inc. (jointly).
Alvan Motor Freight, Inc., Earl C. Smith, Inc., Jones Transfer Company, McDuffee Motor Freight, Inc., Parker Motor Freight, Inc., Transamerican Freight Lines, Inc., United Trucking Service, Inc., United Trucking of Kentucky, Inc., and White Star Trucking, Inc.
Interstate Motor Freight System, Steel Division

Daily Express, Inc. and Samuel J. Lansberry, Inc. (jointly).
Commercial Carrier Corporation and Clay Hyder Trucking Lines, Inc. (jointly).
Kephart Trucking Company
Wenham Transportation, Inc.
Leaseway Transportation Corp.
J & P Trucking Co., Inc.
Tajon, Inc.
Yellow Freight System, Inc.
Ace Doran Hauling and Rigging Co.
W.R. Durand Trucking, Inc.
Key Way Transport, Inc., Wisconsin Pacific Express, Inc., Zipco Trucking, Inc., Coldway Food Express, Inc., Builders Transportation Co., Leo J. Umerley, Inc., Roadhound Truck Company, R.G.C. Cargo Carriers, Inc., Pinto Trucking Service, Inc., G.G. Parsons Trucking Co., J.M.C. Transport, Inc., H & M Motor Lines, Fall River & New Bedford Express Co., Inc., Direct Courier, Inc., Command Cargo Corporation, Mmar Transportation, Inc., Galveston Truck Lines Corp., The Terminal Corporation, MAC of Wisconsin, Inc. (jointly).
Schneider Transport, Inc., Schneider Tank Lines, Inc., Trans-National Truck, Inc., Distribution Service System, Inc., WNI, Inc., and National Bulk Transport, Inc. (Jointly).
Kale Transport, Inc.
Dahlsten Truck Line, Inc.
Senn Trucking Company
W & L Motor Lines, Inc.
Dixie Express, Inc.
Priority Freight Systems, Inc.
Joe Brown Company, Inc.
Monkem Co., Inc.
Artim Transportation System, Inc.
Herzog Trucking Company, Inc.
Hahn Trucking Line, Inc.

AID Incorporated
Arrow Truck Lines, Inc., Hi-Way Dispatch, Inc.
Bob Witaker & Son
Frozen Food Express, Inc.
Unidentified Carrier comment submitted by Sam Zuzich
Arrow Transfer & Storage Company
Motek Transport, Inc.
Yeary Transfer Company
General Delivery Incorporated
Midwest Emery Freight System, Inc., Little Audrey's Transportation Co., Inc., Belford Trucking Co., and Trans-Cold Express, Inc. (jointly).
Refrigerated Transport Co., Inc., and Coastal Transport & Trading Co. (jointly).
Charter Express, Inc., Hedrick Associates, Inc., Import Dealers Service Corporation, North Alabama Transportation, Inc., Osborne Truck Line, Inc., Port Norris Express Co., Inc., Wiley Sanders Truck Lines, Inc., Senn Trucking Company, Southern Intermodal Logistics, Inc., The Service Transport Co., Victory Freight-way System, Inc. (jointly).
Michigan & Nebraska Transit Co., Inc., and Pulley Freight Lines, Inc. (jointly).
Ryder Truck Lines, Inc.
Osterkamp Trucking Inc.
Matlack, Inc. (Appearance at oral hearing only)
Melton Truck Lines, Inc.
Stewart Trucking Company, Inc.

Associations and Others

Walter C. Gleba, Jr.
Chamber of Commerce, Fargo, ND
Independent Truckers Association (Arizona Chapter)
Independent Truckers Association (South Dakota Chapter)
Independent Truckers Association (Ohio Chapter)
Independent Truckers Association (Indiana Chapter)
Independent Truckers Association (Colorado Chapter)
Independent Truckers Association (National)

Owner-Operators-Independent Drivers Assn. of America
E. V. Swift
John Gettman
Dump Transport Industries Association
Private Carrier Conference
National-American Wholesale Grocers Association
South Dakota Independent Truckers Assn. (West Chapter)
National Industrial Traffic League
Specialized Carriers and Rigging Association
National Furniture Warehousemen's Association
Regular Common Carrier Conference of the American Trucking Assns., Inc.
Truck Renting and Leasing Association
Steel Carriers' Tariff Association, Inc.
American Movers Conference
Food Marketing Institute
National Agricultural Chemicals Association
Owner Operator Magazine
William Biederman and Irving Klein, Attorneys
U.S. Department of Transportation
Eastern Labor Advisory Association (Cement and Tank Divisions) and Labor Relations Advisory Association (jointly)
Private Truck Council of America, Inc.
American Trucking Associations, Inc.
Truckers Action Conference
National Agricultural Transportation Association
Motor Carrier Lawyers Association
Common Carrier Conference—Irregular Route
International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America
Indiana Farm Bureau Cooperative Association, Inc.
Interstate Commerce Commission, Office of Special Counsel
National Automobile Transporters Association
Texas Citrus Exchange
Sunkist Growers, Inc.

APPENDIX B

The following language, inserted into a lease of equipment and driver(s) between an unregulated lessor and a shipper or private carrier, meets our six minimum criteria for the performance of private carriage by a shipper utilizing unregulated equipment and drivers from a single source, and raises a rebuttable presumption of private carriage, exempt from Commission jurisdiction under 49 U.S.C. 10524(a). Parties may or may not desire to address in the lease other issues characterizing a transportation service, some of which are identified in the decision.

1. The period for which the lease applies shall be for 30 days or more.

2. The equipment subject to the lease shall be exclusively committed to the lessee's use for the term of the lease.

3. During the term of the lease, the lessee shall accept, possess, and exercise exclusive dominion and control over the leased equipment. The lessee shall further assume complete responsibility for the operation of the equipment.

4. The lessee shall maintain public liability insurance, in amounts required by law, or shall otherwise accept responsibility to the public for any injury to persons or damage to property sustained during the performance by it of any transportation with leased equipment and drivers. The lessee agrees to display appropriate identification on all equipment leased by it, showing operation by the lessee during the performance of such transportation.

5. During performance by it of transportation, the lessee shall accept responsibility for, and bear the cost of, compliance with safety and other requirements imposed by the Interstate Commerce Commission, the Department of Transportation (Bureau of Motor Carrier Safety),

and the various State and local requirements. This includes, but shall not be limited to, compliance with drivers' hours-of-service rules, driver licensing, acquisition of applicable permits, and length and weight requirements.

6. The lessee agrees to maintain in effect, throughout the period of the lease, adequate cargo loss and damage insurance coverage covering the property being transported, or to otherwise remain liable for such cargo damage and/or loss.

APPENDIX B

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

Nos. 82-5247, 82-8133

RYDER TRUCK LINES, INC.,
Petitioner,

v.

UNITED STATES OF AMERICA and
INTERSTATE COMMERCE COMMISSION
Respondents.

BOWMAN TRANSPORTATION, INC., *et al.*,
Petitioners,

v.

UNITED STATES OF AMERICA, and THE
INTERSTATE COMMERCE COMMISSION,
Respondents.

Oct. 11, 1983

Petitions for Review of Orders of the
Interstate Commerce Commission

Before KRAVITCH, HENDERSON and ANDERSON, Circuit Judges.

R. LANIER ANDERSON, Circuit Judge:

Petitioners[1] request that we set aside a policy statement issued by the Interstate Commerce Commission (ICC or Commission) in a proceeding formally entitled Ex Parte No. MC-122 (Sub-No. 2), *Lease of Equipment and Drivers to Private Carriers* (February 9, 1982). In essence, the ICC has announced a new formula for determining whether a particular transportation leasing arrangement constitutes "for-hire carriage," subject to ICC regulation, or "private carriage" exempt from such regulation. Because we conclude that a rational basis exists for the new formula proposed by the ICC, we deny the petition.

I. The Regulation of "For-Hire" Carriage.

The Motor Carrier Act of 1935, 49 Stat. 543-67, 49 U.S.C.A. § 10101, *et seq.* (West 1982 Pamphlet), subjects the provision of for-hire motor transportation to regulation by the ICC. The aim of the act generally is "to assure that shippers . . . will be provided a healthy system of motor carriage to which they may resort to get their goods to market." *United States v. Drum*, 368 U.S. 370, 374, 82 S.Ct. 408, 410, 7 L.Ed.2d 360 (1962); *see* S.Doc. No. 152, 73rd Cong., 2d Sess. (1934); H.R. Doc. No. 89, 74th Cong., 1st Sess. (1935); H.R.Rep. No. 1645, 74th Cong., 1st Sess. (1935). In order to achieve this goal of a stable transportation industry, the Act provides for collective rate-making and erects stringent

[1] Petitioners in these consolidated actions include Ryder Truck Lines, Inc., American Trucking Associations, Inc., Common Carrier Conference-Irregular Route, Regular Common Carrier Conference, National Tank Truck Carriers, Inc., Specialized Carriers and Rigging Association, National Automobile Transporters Association, Bowman Transportation, Inc., and the Steel Carriers Tariff Association, Inc. The following parties are intervenors in this action: the National Association of Regulatory Utility Commissioners, the American Movers Conference, and the International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America. All petitioners and intervenors hereinafter will be referred to collectively as "petitioners."

barriers to entry into the transportation industry to ensure the need for, and reliability of, those carriers authorized to engage in for-hire transportation. The Act also recognizes the need to allow a merchant to continue to transport *its own goods* "in furtherance of its non-transportation business," *Mercury Motor Express, Inc. v. United States*, 648 F.2d 315, 317 (5th Cir. June 18, 1981);[2] *see* S.Rep. No. 482, 74th Cong., 1st Sess. (1935); H.R.Rep. No. 1645, *supra*. The Act therefore regulates only "common" or "contract" carriers that engage in transportation for compensation or "for-hire carriage." *See* 49 U.S.C.A. §§ 10102(11) & 10102(12). The Act specifically exempts from regulation private carriage. 49 U.S.C.A. § 10102(13).

The original Motor Carrier Act, however, did not provide a substantive definition of private carriage, but rather defined private carriers as transporters of property who are neither common nor contract carriers. Thus, from the outset the ICC was entrusted with the responsibility of determining when the provision of transportation services constitutes exempt private carriage. Moreover, the ICC was required to define this exemption in a manner consistent with Congress' desire to protect shippers from the diversions of traffic that would result from an overly competitive transportation industry. *See United States v. Drum*, 368 U.S. at 374-76, 82 S.Ct. at 410-11. This policy of protecting the motor carrier industry, requiring stringent barriers to entry into the industry, led the ICC at an early date to scrutinize closely nominally private transportation arrangements. Of particular concern to the ICC was a practice known as "single-source leasing," in which the shipper leases both vehicle and driver from the same source. For example,

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[2] In *Bonner v. City of Prichard*, 661 F.2d 1206 (11th Cir. 1981) (en banc), this court adopted as binding precedent all of the decisions of the former Fifth Circuit handed down prior to the close of business on September 30, 1981. *Id.* at 1209.

when a shipper leases the vehicle and driving services of an owner/operator, the ICC must determine whether that owner/operator is engaging in transportation for compensation (for-hire carriage) or whether the shipper is legitimately engaged in procuring equipment and service necessary to engage in private carriage, incidental to its primary non-transportation business. A single-source arrangement potentially can be used to evade the ICC's regulatory authority.

In *H.B. Church Truck Service Co. Common Carrier Application*, 27 M.C.C. 191 (1940), *overruled*, 132 M.C.C. 758 (1982), the ICC recognized the possibility of subterfuge in single-source leasing and attempted to lay down a test to be used when determining whether such arrangements constitute private carriage. The Commission stated that "[e]ssentially the issue is as to who has the right to control, direct, and dominate the performance of the service." *Id.* at 195. If that right of control remained with the lessor, then the lessor would be engaged in for-hire carriage, and subject to ICC regulation. On the other hand, if the right to control, direct and dominate remained with the lessee (i.e., shipper), then the shipper would be engaged in exempt private carriage. Equally important, however, the Commission announced that a *presumption* of for-hire carriage would arise when the shipper leases both vehicle and driver from a single source, such as an owner/operator or a leasing agency. This presumption would yield "to a showing that the shipper has the exclusive right and privilege of directing and controlling the transportation service, as, for example, if the equipment were operated by the shipper's employee." *Id.* at 196. Finally, the determination necessary to rebut the presumption of for-hire carriage would be made in light of all facts and circumstances, none of which would be conclusive by itself.[3] Thus, the *Church*

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[3] In *Church* the Commission found that the arrangement at issue did constitute for-hire transportation. The particular facts which

case formulated the "control" test for distinguishing private carriage from for-hire carriage, and created a rebuttable presumption of for-hire carriage when the shipper engages in single-source leasing.

In 1958, Congress, seeing the need to reinforce the Commission's efforts at preventing subterfuge and evasion of its authority, amended the Motor Carrier Act to clarify somewhat the definition of private carriage. This amendment provided that in order to constitute exempt private carriage it is necessary that:

> (1) the property is transported by a person engaged in a business other than transportation; and
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> (2) the transportation is within the scope of, and furthers a *primary business* (other than transportation) of the person.

Pub.L. 85-626, 72 Stat. 574 (1958), *codified at* 49 U.S.C.A. § 10524 (West 1982 pamphlet) (emphasis added); *see* H.R.Rep. No. 1922, 85th Cong., 2d Sess. (1958); S.Rep. No. 1647, 85th Cong., 2d Sess. (1958).[4]

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led the Commission to hold that the shipper had not exercised sufficient control over the lessor were: (1) the lessor was responsible for maintenance of the vehicle; (2) the lessor paid operating expenses, drivers' salaries, taxes and unemployment compensation; and (3) the lessor provided liability and collision insurance. *See* 27 M.C.C. at 195-96.

[4] The "primary business" test may be viewed as the overall definition of private carriage, while the "control" test, and later, the "substance" test, see below, are the *means* for determining whether transportation is incidental to a primary business. *See* Farris & Southern, *Federal Regulatory Policy Affecting Private Carrier Trucking*, 49 I.C.C.Prac.J. 503, 512-15 (1982). Congress' adoption of the primary business test was caused by the proliferation of so-called "buy-sell" arrangements under which carriers attempted to avoid ICC regulation by literally purchasing the goods to be transported and then selling them upon reaching their destination. By engaging in such arrangements carriers would literally be shipping their own goods: superficially, this would seem to constitute pri-

Contemporaneously with the 1958 amendments, the Commission itself began to reformulate the control test it had announced in *Church*. Thus, in *Pacific Diesel Rental Co.—Investigation of Operations*, 78 M.C.C. 161 (1958), the Commission held that the control test required an answer to the following question: "Are any persons . . . in substance engaged in the business of interstate or foreign transportation . . . for hire?" *Id.* at 172 (using both new formulation and older "control" test). The reformulation signaled a more searching inquiry that was to focus not only on the physical aspects of control and direction, but also on the financial arrangements existing between the lessor and the shipper.[5] This refinement reached its culmination in *Oklahoma Furniture Manufacturing Co.—Investigation, Operations*, 79 M.C.C. 403, 409-10 (1959), *overruled*, 132 M.C.C. 758 (1982), in which the Commission announced that the control test was a separate inquiry from that required in *Pacific Diesel*, and that *Pacific Diesel* in essence created a supplementary test of "substance." Under the Com-

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vate carriage. Both the Commission and Congress, however, saw the arrangement quite differently. *See Brooks Transp. Co. v. United States*, 93 F.Supp. 517 (E.D. Va. 1950), *aff'd*, 340 U.S. 925, 71 S.Ct. 501, 95 L.Ed. 668 (1951) (mem.). Thus, the Senate Report states that the amendment was intended "to correct most of the abuses that have arisen in the name of private carriage and yet would not in any way jeopardize or interfere with the operations of private carriers to provide transportation service—even if the charge is made—as an integral part of a primary business function." S.Rep. No. 1647, *supra*, at 5. *See also Nuclear Diagnostic Laboratories, Inc., Contract Carrier Application*, 131 M.C.C. 578, 581-84 (1979). Perhaps more significant, however, was the Senate's continued concern with the diversion of traffic from regulated carriers to illegitimate private carriers. Such illegitimate carriers could avoid not only ICC rate and licensing requirements, but could also avoid payment of federal excise taxes. S.Rep. No. 1647, *supra*, at 23.

[5] *See generally*, M. Fair & J. Guandolo, *Transportation Regulation* 84 (8th ed. 1979).

mission's new two-pronged test, in order to find that a particular arrangement constitutes private carriage, it would be necessary that no person other than the shipper had "any right to control, direct, and dominate" the transportation service and that no person was "in substance, engaged in the business of . . . transportation of property . . . for hire." 79 M.C.C. at 410. Moreover, the Commission stated that with regard to the first prong, the control test, "there is present, *whenever the owner-operator drives his own equipment*, the right and power of the lessor to defeat any supposed right to control that the shipper lessee may believe exists." *Id.* at 411 (emphasis added). As a result of this two-prong test, the exercise of physical control and domination by the shipper no longer would necessarily suffice to support a finding of private carriage. Rather, under the "substance" prong of the inquiry, the Commission would examine the financial relationship between the lessor and the shipper in an effort to determine whether the lessor was in effect providing a transportation service to the shipper.[6]

This new formulation by the Commission was expressly upheld by the United States Supreme Court in *United States v. Drum*, 368 U.S. 370, 82 S.Ct. 408, 7 L.Ed.2d 360 (1962). During the course of its opinion, the Supreme Court examined Commission case law and stated that the new two-prong test announced by the Commis-

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[6] The financial factors found by the Commission in *Drum*, which proved the existence of for-hire carriage, were as follows: (1) the owner/operators provided exclusive use for a continuous period of time; (2) equipment was furnished, maintained and driven by the owners; (3) all operating costs and trip expenses were borne by the owners; and (4) the owners guaranteed a fixed cost for the transportation and assumed the risk of all losses. 79 M.C.C. at 412. One authority has identified 14 factors that often are considered by the Commission in making its determination. *See generally*, Matthews, *Truck Leasing by Shippers and the Problem of Dangling Instrumentalities*, 32 I.C.C.Prac.J. 370 (1964). For a concise history of the development of the Commission's views as to what constitutes private carriage, see Farris & Southern, *supra* note 3, at 505-16.

sion was in reality "an explicit recognition [of] a premise which has long been implicit in [the Commission's] decisions: That some indicia of private carriage may be assumed, and detailed surveillance of operations undertaken, without a shipper's having significantly shouldered the *burdens of transportation*." 368 U.S. at 383-84, 82 S.Ct. at 414-15 (emphasis added). The court thus interpreted the Commission's examination of the financial relations between the parties as permissibly treating financial risks as a significant burden of transportation. *Id.* at 385, 82 S.Ct. at 415. To date, the Commission generally has followed the analysis set forth in *United States v. Drum*, and has examined not only the degree of control exercised by the shipper but also the financial obligations, liabilities, and risks allocated to each party. Further, the Commission has continued to rely on the presumptions announced in *Church* and *Drum*. *See, e.g., All Points, Inc.—Investigation of Operations*, 123 M.C.C. 242 (1975); *Snyder's Wholesale Liquors, Inc., Petition*, 113 M.C.C. 528 (1971); *American Equipment Rental, Inc.—Investigation*, 96 M.C.C. 383 (1964). *Compare Ontario Co.—Declaratory Order*, 112 M.C.C. 211 (1970); *Rayette, Inc.—Investigation of Operations*, 108 M.C.C. 410 (1969).

II. The Policy Statement

The instant proceeding commenced on December 24, 1980, when the ICC made public a proposed policy statement, Ex Parte No. MC-122 (Sub-No. 2) *Lease of Equipment and Drivers to Private Carriers*, 132 M.C.C. 351, 45 Fed. Reg. 86766 (Dec. 31, 1980) (Notice of Proposed Policy Statement). The purpose of the proposal was "to consider whether, in light of the exempt nature of private carriage operations, [the Commission] should modify [the] current policy prohibiting persons who do not hold operating authority from this Commission (e.g., owner/operators) from leasing their equipment with drivers di-

rectly to private carriers for the performance of private carriage operations. . . ." 132 M.C.C. at 352. Accordingly, the Commission solicited notice and comment from all interested parties, held a public hearing during the course of the proceeding, and issued its final policy statement on February 9, 1982. *See Lease of Equipment and Drivers to Private Carriers*, 132 M.C.C. 756 (1982), 47 Fed. Reg. 7885 (Feb. 23, 1982).[7]

The substance of this new policy was a reformulation of the criteria to be applied in determining whether a particular leasing arrangement constitutes private or for-hire carriage. Specifically, the Commission declared that no longer would it employ the presumption announced in *Church* that leases of equipment with drivers (single-source leases) ordinarily constitute for-hire transportation by the lessor. Further, the Commission rejected the presumption announced in *Oklahoma Furniture* and upheld in *Drum* that an owner/operator when driving his own equipment has the inherent right and power to defeat the shipper's ability to control, direct and dominate transportation. In addition to eliminating these presumptions, the Commission promulgated a list of factors that it will examine when determining whether exempt private carriage exists.[8] Further, the Commission announced a list of minimum requirements which if included in a *lease* between a shipper and an owner/operator would create a presumption that "the transportation being per-

[7] The final policy statement was to become effective 30 days after publication in the Federal Register, thus complying with § 4 of the Administrative Procedure Act. *See* 5 U.S.C.A. § 553(d) (West 1977).

[8] According to the Commission:

> [W]e intend to focus on control, responsibility, and the performance of key organizing and management functions of a transportation service as the critical elements of determining who is performing service, and in characterizing the type of carriage being performed.

132 M.C.C. at 777.

formed is private carriage controlled by the shipper." 132 M.C.C. at 778. According to the Commission, such a presumption could be rebutted by a showing that the actual operation of the lease arrangement indicated an absence of the degree of control and responsibility required of the shipper.[9]

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[9] The list of minimum requirements is as follows: (1) the leased equipment must be exclusively committed to the lessee's use for the term of the lease; (2) the lessee must have exclusive dominion and control over the transportation service during the term of the lease; (3) the lessee must maintain liability insurance for any injury caused in the course of performing the transportation service; (4) the lessee must be responsible for compliance with safety regulations; (5) the lessee must bear the risk of damage to cargo; and (6) the term of the lease must be for a minimum period of 30 days. 132 M.C.C. at 778-79. According to the Commission, when the foregoing terms are embodied in a lease, then a presumption of private carriage will arise. Additionally, the Commission enumerated ten other factors which, though not conclusive, are entitled to weight: (1) whether the lease is in writing; (2) whether the lease is for round trips; (3) whether the driver becomes the lessee's employee; (4) whether the equipment is sometimes driven by a person other than the owner/operator or someone selected by him; (5) whether the lease is of tractor only, or of tractor and trailer; (6) who assumes the risk of loss or damage to the equipment, and who pays for fire, theft, and collision insurance thereon; (7) whether the lessee pays or reimburses the driver for such expenses as fuel, oil, tolls, en route repairs, and loading/unloading charges; (8) whether the lessor is required to repair and maintain the equipment; (9) whether the lease provides for some fixed minimum payment, regardless of use; and (10) whether the lessee is assisting the lessor to finance the equipment, and/or whether it holds legal title in trust for the lessor. *Id.* at 780-82. The primary thrust of the Commission's enumeration is to deemphasize certain of the factors referred to in *Drum* as "significant burdens of transportation." 368 U.S. at 385, 82 S.Ct. at 415. In particular, the Commission no longer views as highly significant such factors as whether the shipper has avoided the need for capital investment, whether the lessor assumes the risk of non-utilization of property, whether maintenance is performed at the expense of the lessor, and whether compensation is based on mileage or is at a flat fee. *Compare* 132 M.C.C. at 776, *with Heavy Equipment Rental Co., Investigation*, 98 M.C.C. 365 (1964). According to the Commission, other factors are equally or

The policy statement makes clear, however, that the Commission will not rely upon any precise formula or list of criteria, or:

> restrict [its] inquiry to the formal recitals of the lease agreement, but will—as in the past—examine all surrounding facts and circumstances and the actual conduct of operations under the lease to ascertain if the true substance of the arrangement is in accord with that recited in the formal agreement."

Id. at 776.[10]

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more indicative of private carriage. *See* 132 M.C.C. at 776 ("Our present view of what the term 'characteristic burdens of transportation' encompasses is not the same as that utilized in the Commission's earlier decisions").

[10] The Commission's list of criteria which give rise to a presumption that service is private carriage is comparable to the criteria now used to determine whether an owner/operator may lease his equipment and services to a regulated common carrier. Indeed, the Commission has explicitly stated that henceforth the same test of control shall govern regardless of whether the user is a regulated carrier or a private shipper:

> When a private carrier furnishes service in vehicles owned and operated by others, it must control the service to the same extent as if it owned the vehicles, but need control the vehicles only to the extent necessary to be responsible to the public and the Department of Transportation.

132 M.C.C. at 777 (paraphrasing standard of control used for leases by owner/operators to regulated carriers, *see Lease and Interchange of Vehicles by Motor Carriers*, 52 M.C.C. 675, 681 (1951)), *modified*, 64 M.C.C. 361 (1955), *modified*, 68 M.C.C. 553 (1956); *see* 49 C.F.R. § 1057.-11-.12. During the course of this proceeding, the Commission placed great reliance on the inherent logic of applying the same test of control to private shippers that has always been applied to common carriers leasing from a single source. The logic is not compelling, however. As the Commission points out, the use of different standards of "control," depending upon whether the lessee is a shipper or a regulated carrier, may be explained by the earlier policy of encouraging owners and operators

On March 4, 1982, parties in opposition to the policy statement petitioned the Commission for a stay of its order pending judicial review. This petition was denied on March 18, and a petition for judicial review of the Commission's policy statement was duly filed in this court.

Although the great number of petitioners has resulted in an even greater number of issues, petitioners' essential

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to ally themselves with the regulated industry. By affirmatively discouraging the use of owner/operators by shippers, the ICC could ensure that they would be regulated by virtue of their relationship to a regulated carrier. *See* 132 M.C.C. at 767. Thus, the Commission argues, because Congress is no longer concerned with protecting carriers from diversions of traffic, there is no reason to continue discouraging owner/operators from working for private shippers. This argument has a superficial appeal, but is vulnerable in several respects. First, the Commission's parity argument ignores the reality of the regulations regarding the owner/operator-common carrier relation. Regulated carriers which utilize the services of owner/operators have for some time been subject to "Truth in Leasing" regulations which are aimed primarily at protecting owner/operators. *See* 49 C.F.R. § 1057. The requirements contained in those regulations go much further toward ensuring that common carriers assume control and responsibility for leased owner/operators than anything the Commission has proposed as between shippers and owner/operators. Second, a more relaxed standard of control in the regulated carrier context would be reasonable because there is no possibility for subterfuge; owner/operators hauling goods for others through some kind of arrangement with a regulated carrier will be regulated in any event, either by direct regulation of the owner/operator, or, if controlled by the carrier, by regulation of the carrier. There can be no escape from regulation. It is for precisely this reason, i.e., escaping regulation, that owner/operators may attempt to lease to private carriers. Thus, the potential for subterfuge is present only in the private carriage context. Further, the Commission's "parity" argument does not take into account the significant reasons, other than economic, for encouraging owner/operators to bring themselves under the control of regulated rather than private carriers. *See* Record at 155-71 (documenting safety requirements imposed by common carrier on owner/operators). For these reasons, the Commission's attempt to equate the control requirements in the regulated and private context is not, by itself, persuasive.

contentions are as follows: (1) the Commission improperly proceeded by way of a general statement of policy rather than through rule-making; (2) the proposed changes are beyond the Commission's statutory authority; (3) the change in policy is arbitrary, capricious, or an abuse of discretion; and (4) the Commission failed to abide by the requirements of the National Environmental Policy Act (NEPA), 42 U.S.C.A. § 4321, *et seq.* (West 1977), and the Energy Policy and Conservation Act (EPCA), 42 U.S.C.A. § 6201, *et seq.* (West 1977). Each of these contentions will be discussed in turn.

III. Policy Statement or Rule-Making

Petitioners first argue that because of the far reaching and binding effect which the policy statement will have on future adjudication the Commission acted improperly in proceeding by way of a general statement of policy rather than through a rule-making procedure in accordance with the requirements of § 4 of the Administrative Procedure Act, 5 U.S.C.A. § 553 (West 1977).[11]

Petitioners concede that though this proceeding was labeled a "proposed policy statement," the Commission complied with the notice and comment requirements of § 4. Nonetheless, in order to determine the relevant standard of review, *see* 5 U.S.C.A. § 706(2) (West 1977), we must determine whether the Commission's action was properly denominated a general statement of

[11] Section 553 requires generally that the agency provide notice of a proposed rule-making in the Federal Register, reference to the legal authority under which the rule is proposed, and a description of the subjects and issues involved. Further, § 553 requires that interested parties have an opportunity to submit relevant data, comments, and arguments. Finally, the agency must publish the rule 30 days prior to its effective date, and incorporate in the rule a "concise general statement" of the rule's basis and purpose. *See* 5 U.S.C.A. § 553 (West 1977). However, § 553 exempts from the "notice and comment" requirements "interpretive rules, *general statements of policy*, or rules of agency organization, procedure, or practice." 5 U.S.C.A. § 553(b)(A) (emphasis added).

policy. Although making this determination is often "akin to wandering lost in the Serbonian bog," *Jean v. Nelson*, 711 F.2d 1455 (11th Cir. 1983), *reh'g granted*, 714 F.2d 96 (1983), "enshrouded in considerable smog," *Noel v. Chapman*, 508 F.2d 1023, 1030 (2d Cir.), *cert. denied*, 423 U.S. 824, 96 S.Ct. 37, 46 L.Ed.2d 40 (1975), the question need not detain us long.

Generally, whether a particular agency proceeding announces a rule or a general policy statement depends upon whether the agency action establishes "a binding norm." *Guardian Federal Savings and Loan Association v. Federal Savings and Loan Insurance Corp.*, 589 F.2d 658, 666 (D.C. Cir. 1978) (quoting *Pacific Gas & Electric Co. v. FPC*, 506 F.2d 33, 38 (1974); see *American Trucking Association v. ICC*, 659 F.2d 452, 463 (5th Cir. Oct. 23, 1981) (Unit A), *cert. denied*, — U.S. —, 103 S.Ct. 1272, 75 L.Ed.2d 493 (1983); *Mercury Motor Express, Inc. v. United States*, 648 F.2d at 319; *Brown Express, Inc. v. United States*, 607 F.2d 695, 701 (5th Cir. 1979); *Regular Common Carrier Conference of the American Trucking Associations, Inc. v. United States*, 628 F.2d 248, 250-51 (D.C. Cir. 1980). The key inquiry, therefore, is the extent to which the challenged policy leaves the agency free to exercise its discretion to follow or not to follow that general policy in an individual case, or on the other hand, whether the policy so fills out the statutory scheme that upon application one need only determine whether a given case is within the rule's criterion. As long as the agency remains free to consider the individual facts in the various cases that arise, then the agency action in question has not established a binding norm. *See American Trucking Associations, Inc. v. ICC*, 659 F.2d at 463; *Regular Common Carrier Conference of the American Trucking Associations, Inc. v. United States*, 628 F.2d at 251 (if agency explicitly says new policy leaves open free exercise of informed discretion, then rights and duties have not actually been

diminished, and binding norm has not been established); *Guardian Federal Savings and Loan Association v. Federal Savings and Loan Insurance Corp.*, 589 F.2d at 667 (agency must remain prepared to defend policy in subsequent proceeding and may not claim matter is foreclosed).

As noted earlier, the Commission has explicitly stated that each case shall be decided by examining the totality of the facts bearing upon the relationship between the lessor and the shipper. Although the Commission has enumerated various criteria which establish a presumption of private carriage, this presumption remains rebuttable. In particular the Commission has stated that it will scrutinize the actual operation of apparently conforming leases to determine whether the terms have been followed. The use of such presumptions generally serves to direct the analysis but not necessarily the answer. Therefore, the use of presumptions does not reasonably transform a statement of policy into a binding norm. *See Regular Common Carrier Conference of the American Trucking Associations, Inc. v. United States*, 628 F.2d at 251 (use of rebuttable presumptions preserves discretion to determine each case on its own factual circumstances). In our view this case is quite similar to *Guardian Federal Savings and Loan Association v. Federal Savings & Loan Insurance Corp., supra.*[12] We con-

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[12] In *Guardian Federal Savings and Loan*, the agency promulgated criteria by which to measure the adequacy of audits required of certain lending institutions. The court held that although the criteria were quite specific, nonetheless they were not determinative of the adequacy of an audit, and the agency remained free to accept nonconforming audits. *See* 589 F.2d at 666-68. Likewise, although a lease between a shipper and lessor may comply with the terms recommended by the Commission's policy statement, if the facts indicate that the actual operation of the arrangement constitutes the provision of transportation services, or if factors above and beyond the provisions contained in the lease indicate same, then the Commission remains free to deny private carrier status.

clude that, to the extent the Commission abides by its disclaimer of having established a binding norm, its characterization of this action as a general statement of policy was correct.

As a general statement of policy, the Commission's action is reviewed by this court only to determine whether it is arbitrary, capricious, an abuse of discretion, or otherwise contrary to law or in excess of the Commission's statutory authority. 5 U.S.C.A. § 706(2)(A)-(D) (West 1977); *see Mercury Motor Express, Inc. v. United States*, 648 F.2d at 319; *Assure Competitive Transportation, Inc. v. United States*, 635 F.2d 1301, 1307 (7th Cir. 1980). Under this standard our task is limited to determining "whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." *Bowman Transportation, Inc. v. Arkansas-Best Freight System*, 419 U.S. 281, 285, 95 S.Ct. 438, 441, 42 L.Ed.2d 447 (1974); *see American Trucking Association, Inc. v. United States*, 642 F.2d 916, 920 (5th Cir. April 17, 1981) (court inquires only to see that statement rationally supported, that agency considered relevant factors and avoided clear errors, and that agency articulated rational connection between facts found and conclusions premised on those facts); *National Tour Brokers Association v. ICC*, 671 F.2d 528, 532 (D.C. Cir. 1982) (review under arbitrary and capricious standard confined to whether rational basis may be found in facts of the record); *Consolidated Rail Corp. v. United States*, 619 F.2d 988, 993 (3d Cir. 1980) (same). Thus, as long as the "agency policy is within the agency's delegated power and meets the test of reasonableness, a court may not upset it without usurping the agency's power." 2 K. Davis, *Administrative Law Treatise* § 7.5, at 25 (2d ed. 1979). *See also Baltimore Gas and Electric Co. v. National Resources Defense Council, Inc.*, — U.S. —, —, 103 S.Ct. 2246, 2257, 76 L.Ed.2d 437, 452 (1983). We proceed to a determination of whether the policy statement satisfies these limited requirements.

IV. The Commission's Statutory Authority to Define Private Carriage.

Petitioners' primary contention is that the Commission's attempt to reformulate the test for defining private carriage was beyond its statutory authority. Petitioners advance the following three arguments in support of this contention: (1) the Motor Carrier Act requires adherence to the definition and presumptions announced in *Church* and in *Drum*; (2) adherence to the definition and the presumption formerly relied upon are mandated by the Supreme Court's opinion in *Drum*; and (3) adherence to the definition and its presumptions is required by implicit Congressional approval of the *Drum case*. In our view these contentions must ultimately fail.

First, the parties have brought to our attention no congressional comment on either the definition of private carriage as formulated in *Drum* or the presumptions regarding single-source leasing adopted by the Commission in the *Church* and *Oklahoma Furniture* decisions. The only attempt by Congress to legislate with regard to the substantive definition of private carriage occurred in the 1958 amendments to the Motor Carrier Act. In those amendments, Congress ratified the Commission's decision to adopt the "primary business test" when determining whether a shipper's carriage of goods *in addition to* its own private carriage rendered that shipper or the carrier leased by that shipper a common or contract carrier subject to ICC permit and licensing regulations. *See Nuclear Diagnostic Laboratories, Inc., Contract Carrier Application*, 131 M.C.C. 578, 581-84 (1979). Although congressional explanation of the amendment centered on the continued concern for diversion of traffic from regulated carriers to illegitimate private carriers, *see* S.Rep. No. 1647, *supra*, at 23, neither the House nor the Senate attempted to formulate a comprehensive distinction between private and for-hire carriage. Rather, the amendment was aimed at a specific type of arrangement commonly

used to avoid the label of for-hire carriage. *See supra* note 3.[13] Likewise, although the Motor Carrier Act of 1980 addressed certain limited aspects of the unregulated carriage industry, there is no discussion in either the House or the Senate Report regarding the appropriate distinction between private and for-hire carriage. Thus, there is no merit to the contention that adherence to the *Drum* analysis with its concomitant presumption is mandated by congressional statements in the Motor Carrier Act and its amendments.

Similarly, we are convinced that the *Drum* case itself does not require continued use of the presumptions rejected by the ICC in this proceeding. Rather, throughout its opinion in *Drum* the Supreme Court reiterated the need to accord the Commission some discretion in determining the appropriate scope of for-hire carriage. For example, the Court commented on the evolving "technique" of analysis used by the Commission. In upholding the Commission's formulation of an appropriate definition of private carriage, the Court explicitly stated that the Commission's conclusions "were well within the range of responsibility Congress assigned to the Commission." 368 U.S. at 385, 82 S.Ct. at 415.

It is true that the Court imposed certain constraints upon the Commission's discretion. For example, the

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[13] The following excerpt from House Report 1922 is indicative of the sentiments expressed in support of the amendment:

> This amendment provides that no person shall, in connection with any other business enterprise, transport property by motor vehicle in interstate or foreign commerce unless such transportation is incidental to, and in furtherance of, the primary business enterprise (other than transportation) of such person. There is no intention on the part of this committee in any way to jeopardize or interfere with bona fide private carriage, as recognized in [*Brooks Transp. Co. v. United States*, 340 U.S. 925, 71 S.Ct. 501, 95 L.Ed. 668 (1951), *aff'g* 93 F.Supp. 517 (E.D. Va. 1950)].

H.R.Rep. No. 1922, *supra*, at 18.

Court stated that because the statutory definitions of private and for-hire carriage "must, if they are to serve their purpose, impose practical limitations upon unregulated competition in a regulated industry, they are to be interpreted in a manner which transcends the merely formal." *Id.* at 375, 82 S.Ct. at 410. Moreover, the Court suggested that the Commission's occasional reformulations of the distinction between private and for-hire carriage were permissible largely because each formulation revolved around a central and implicit theme: "a purported private carrier who hires the instrumentalities of transportation from another must—if he is not to utilize a licensed carrier—assume in significant measure the characteristic burdens of the transportation business." *Id.* at 375, 82 S.Ct. at 410.

Indeed, since *Drum* the Commission has frequently restated its test of substance in terms of the "characteristic burdens of transportation." *See Personnel Service, Inc.—Investigation of Operations and Practices*, 110 M.C.C. 695, 704-06 (1969); *Heavy Equipment Rental Co., Investigation*, 98 M.C.C. 365, 394 (1964). Overall, however, the Court's opinion reflects a deference to the Commission's informed judgment as to what types of burdens are characteristic of the provision of for-hire transportation. *See* 368 U.S. at 385, 82 S.Ct. at 415 (Commission's belief that financial risks are a significant burden of transportation is well within range of responsibility assigned to Commission); *id.* at 374, 82 S.Ct. at 410 (formulation of private carriage in *Drum* is recent instance of Commission's developing technique of decision); *id.* at 376, 82 S.Ct. at 411 (Commission's current resolution of problem does not violate coherence of body of administrative and judicial precedents so far developed in this area). Finally, the Court expressly sanctioned an analysis which focuses on the totality of circumstances rather than the dispositive significance of any one factor. *See id.* at 384, 82 S.Ct. at 415 (emphasizing use of totalities

and noting that indicia are "instruments of decision, not touchstones"; "Commission allowably dealt with this novel situation as an integral and unique problem in judgment, rather than simply as an exercise in counting commonplaces").

Although the Commission's new statement of policy abandons the presumptions regarding single-source leasing announced in *Church* and *Oklahoma Furniture*, and affirmed in *Drum*, the Commission has continued to adhere to an approach that requires examination of all circumstances regarding the relationship between the lessor and the shipper. Moreover, this adherence to an intensely factual determination informed by relevant criteria at least facially ensures the interpretation of private carriage "in a manner which transcends the merely formal." *Id.* at 375, 82 S.Ct. at 410. At most the Commission's new policy articulates new criteria for determining when the control of the transportation by the shipper indicates that the shipper has shouldered the burdens of transportation necessary to have assumed control over the lessor. Thus, rejecting the presumption of for-hire carriage arising from single source leasing, and the presumption that the owner/operator possesses the inherent power to defeat the control of the transportation by the shipper, is indicative only of the Commission's new views as to which burdens constitute significant indicia of private transportation. *Compare Personnel Service, Inc.—Investigation of Operations and Practices*, 110 M.C.C. at 709-10. *See also supra* note 8. We therefore conclude that the Supreme Court's opinion in *Drum* does not preclude the Commission's reconsideration of the presumptions announced in *Church* and *Oklahoma Furniture*.

Finally, petitioners assert that the Commission's longstanding interpretation of private carriage, combined with Congress' failure to articulate a differing interpretation, precludes the Commission from formulating a different test at this late date. Thus, petitioners argue

that Congress has implicitly approved the standards described in *Drum*.

Generally, courts place great weight upon long-standing interpretations and policies announced by an agency, and closely scrutinize departure from agency precedent. *See, e.g., NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 94 S.Ct. 1757, 40 L.Ed.2d 134 (1974);[14] *Atchison, Topeka & Santa Fe Railway Co. v. Wichita Board of Trade*, 412 U.S. 800, 93 S.Ct. 2367, 37 L.Ed.2d 350 (1973); *American Trucking Associations v. Atchison, Topeka and Santa*

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[14] Although *NLRB v. Bell Aerospace Co.* involved an agency interpretation of its statute rather than a policy statement, the analysis used by the Supreme Court is instructive. In *Bell*, the NLRB had certified a union as the bargaining representative of a group of "managerial employees." In so doing, the NLRB rejected its long-standing interpretation that managerial employees are not protected by the labor laws; instead, the NLRB held that only managerial employees responsible for "the formulation and implementation of labor relations policies" are excluded by the National Labor Relations Act. 416 U.S. at 269-72, 94 S.Ct. at 1759-61. The Supreme Court reversed the NLRB, holding that the Board was bound by its earlier, long-standing interpretation. In support of its holding, the Court relied primarily on Congress' legislative reaction to the NLRB's interpretation at the time of the Taft-Hartley Act. When drafting the Act, Congress inserted specific provisions to make clear that certain types of employees were excluded by the Act. In other instances, however, Congress explicitly found it unnecessary to legislate with regard to certain employees, including managerial employees, because such employees *already were excluded* under the Board's interpretation of the NLRA. *See id.* at 277-84, 94 S.Ct. at 1763-67. Subsequent to passage of the Taft-Hartley Act, the Board continued to adhere to this interpretation for over two decades. Thus, the Court concluded that Congress' express reliance on the Board's interpretation, combined with the Board's long-standing adherence, made that interpretation binding on the Board. *See id.* at 285-89, 94 S.Ct. at 1767-69. *See also Association of American Railroads v. ICC*, 564 F.2d 486, 493 (D.C. Cir. 1977) ("doctrine of reenactment" applies only if Congress was aware of agency interpretation and affirmatively indicated intent not to change interpretation). As indicated earlier, there is no evidence that Congress has made any relevant statements regarding *Drum* sufficient to call into play the doctrine of reenactment.

Fe Railway, 387 U.S. 397, 87 S.Ct. 1608, 18 L.Ed.2d 847 (1967); *Mercury Motor Express, Inc. v. United States*, 648 F.2d 315 (5th Cir. 1981); *Missouri-Kansas-Texas Railroad Co. v. United States*, 632 F.2d 392 (5th Cir. 1980), *cert. denied*, 451 U.S. 1017, 101 S.Ct. 3004, 69 L.Ed.2d 388 (1981). On the other hand, the Supreme Court has stated:

> [T]he Commission, faced with new developments or in light of reconsideration of the relevant facts and its mandate, may alter its past interpretation and overturn past administrative rulings and practice. . . . [T]his kind of flexibility and adaptability to changing needs and patterns of transportation is an essential part of the office of a regulatory agency.

American Trucking Associations v. Atchison, Topeka and Santa Fe Railway Co., 387 U.S. at 416, 87 S.Ct. at 1618 (national transportation policy may authorize Commission departure from precedent even when Congress has considered specific proposals to legislate particular change promulgated by Commission immediately prior to Commission's action); *see Atchison, Topeka & Santa Fe Railway Co. v. Wichita Board of Trade*, 412 U.S. at 808, 93 S.Ct. at 2375 (agency may flatly repudiate past norms, deciding that changed circumstances no longer require those norms in order to effectuate congressional policy, so long as agency clearly sets forth grounds for such departure); *Missouri-Kansas-Texas Railroad Co. v. United States*, 632 F.2d at 402-03 (Commission changes in guidelines valid when the result of process of weighing the public interest which is entrusted to Commission).

The Commission has seized upon its responsibility to monitor the effect of its policies on the industry, and has argued throughout this proceeding that its policy change is supported by changed circumstances. According to the Commission, these circumstances include passage of the 1980 amendments to the Motor Carrier Act and overall

changes in the transportation industry. The test generally used for determining the validity of agency changes in policy is essentially the same as the test for determining whether agency action is arbitrary, capricious, or an abuse of discretion. Because both determinations depend upon the existence of a rational basis for the agency action, *see Mercury Motor Express, Inc. v. United States*, 648 F.2d at 319; *Assure Competitive Transportation, Inc. v. United States*, 635 F.2d at 1307; *Association of American Railroads v. ICC*, 564 F.2d at 495, we will treat these two determinations as one.

V. Basis for the Policy Change.

The Commission argues that changes in the nature of the trucking industry occurring since passage of the 1935 Act provide adequate support for its change in policy. Specifically, the Commission contends that neither the regulated sector nor the private carriage sector occupies the tenuous position it occupied in 1935.[15]

The Commission apparently infers from the increased stability of both the regulated and unregulated sectors that there is a reduced need for protection of regulated carriers from encroachment by private carriers. The Commission further reasons that reduced barriers to entry into the regulated sector decrease the likelihood of subterfuge which motivated the Commission to adopt at an early date a stringent test for defining private carriage. *See All Points, Inc.—Investigation of Operations*, 123 M.C.C. 242, 250-52 (1975). The Commission concludes that its new policy statement, retaining as it does the basic test of control announced 40 years ago, will

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[15] *See* 132 M.C.C. at 768 (motor carrier industry bears little resemblance to precarious, fragmented, and unstable industry of the mid-30's). According to the Commission, approximately 40% of truck carriage in this country is transported by private carriers, and private carriers outnumber regulated carriers 9 to 1. *Id.* at 769.

have no "major effect on the overall balance between the regulated and private sectors of the industry." 132 M.C.C. at 769.

The Commission further argues that adopting the more lenient approach toward single-source leasing by private shippers will increase both competition and efficiency in the private sector by opening up an additional source "of fleet augmentation." Additionally, the new policy will provide added opportunities to owner/operators at a time in which they are in dire economic straits. The Commission therefore concludes that all of these factors together indicate that circumstances have changed sufficiently in 40 years to allow a corresponding change in the Commission's treatment of single-source leasing by private shippers.

As additional support for its policy change, the Commission relies upon "changes in statutory direction," 132 M.C.C. at 757, resulting from the 1980 amendments to the Motor Carrier Act. *See* Pub.L. 96-296, 94 Stat. 1898 (1980), *codified at* 49 U.S.C.A. § 10101, *et seq.* (West 1982 Pamphlet). In particular, the Commission points to the amendments in the National Transportation Policy, which stress the promotion of "competitive and efficient transportation services," and contends that these amendments demonstrate congressional awareness of basic changes in the motor carrier industry. 49 U.S.C.A. § 10101.[16] The Commission believes that a more lenient

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[16] The 1980 amendments added the following language to the National Transportation Policy:

> [I]t is the policy of the United States Government [to provide for the impartial regulation of the modes of transportation subject to this subtitle, and in regulating those modes—]. . . .
>
> (7) with respect to transportation of property by motor carrier, to promote competitive and efficient transportation services in order to (A) meet the needs of shippers, receivers, and consumers; (B) allow a variety of quality and price options to meet changing market demands and the

approach to single-source leasing by private carriers will provide both private carriers and owner/operators with more options when structuring their respective transportation arrangements. The Commission concludes that its reformulation of the test for private carriage will result in greater utilization of equipment and necessary support for the private carrier industry, thereby fostering the competition desired by Congress.

The Commission also points to various amendments either specifically addressed to exempt carriage or which reasonably suggest a different regulatory treatment of such carriage. For example, prior to the 1980 amendments Commission rules prohibited the hauling of the shipper's goods by a member of the shipper's corporate family, such as a wholly-owned subsidiary, without a certificate: In the Commission's view this did not constitute private carriage. Section 9 of the 1980 Act, however, removed this restriction and permitted such intercorporate hauling, provided the parent corporation owned a 100% interest in the transporting subsidiary. *See* 49 U.S.C.A. § 10524(b). The 1980 Act also expanded various existing exemptions in order to permit more efficient use of unregulated carriage. Thus, § 7 of the Act increased the number and type of exempt commodities in order to decrease the incidence of empty backhauls, and increased the exemption for motor carrier transportation

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diverse requirements of the shipping public; (C) allow the most productive use of equipment and energy resources; (D) enable efficient and well-managed carriers to earn adequate profits, attract capital, and maintain fair wages and working conditions; (E) provide ad maintain service to small communities and small shippers; (F) improve and maintain a sound, safe, and competitive privately-owned motor carrier system; (G) promote greater participation by minorities in the motor carrier system; and (H) promote intermodal transportation.

Pub.L. 96-296, 94 Stat. 793 (1980), *codified at*, 49 U.S.C.A. § 10101(a)(7) (West 1982 Pamphlet).

incidental to air transportation.[17] The Commission contends that these specific provisions all support a more lenient approach to defining private carriage in order to eliminate inefficiency and foster competition in the overall transportation industry.

In the Commission's view, however, the most significant support for its change in policy stems from the reduction in barriers to entry resulting from the amendments. For example, § 5 of the 1980 Act substantially reduces the burden of proof on persons applying for common carrier certification and contract carrier licensing. *See* 49 U.S.C.A. §§ 10922, 10923 (West 1982 Pamphlet).[18] The Commission emphasizes that Congress has turned away from the protectionist attitude embodied in the 1935 Act, which required strict maintenance of the line between private and common carriage in order to prevent diversions of traffic detrimental to both the shippers and the transportation industry. Rather, in announcing a transportation policy which focuses on ease

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[17] *See* 49 U.S.C.A. § 10526 (West 1982 Pamphlet); H.R.Rep. No. 1069, *supra*, at 18, *reprinted in* 1980 U.S. Code Cong. & Ad. News 2283, 2300 (to alleviate backhaul problem unregulated motor carrier should be allowed to transport certain farm supply items back to areas of agricultural production); *id.* at 19, *reprinted in* 1980 U.S. Code Cong. & Ad. News 2301 (discussing purpose of expanding "incidental-to-air" exception).

[18] The House Report states:

> Section 5 reflects the Committee's strong belief that increased competition and potential competition will bring about the most efficient and economical delivery of transportation service to the public.
>
> The new entry section provides for a balanced approach to entry, which, by lessening the burden of proof on applicants and correspondingly increasing the burden on persons opposing the application, will encourage new applicants to file for authority to provide needed service.

H.R.Rep. No. 1069, *supra*, *reprinted in* 1980 U.S. Code Cong. & Ad. News 2283, 2296.

of entry and competition, Congress has implicitly sanctioned more lenient treatment of nominally private carriage. Presumably these reduced standards will permit many more businesses to enter the regulated transportation industry, with the result that existing carriers will be less protected from natural competitive forces and more subject to diversions of traffic. Thus, the Commission concludes:

> [T]he 1980 Act gives evidence that Congress is much less concerned than it formerly was over the possibility of diversion of traffic from existing regulated carriers. New section 10922(b)(2)(B) provides that the Commission shall not find diversion of revenue or traffic from an existing carrier to be in and of itself inconsistent with the public convenience and necessity. It is true, as several commentators point out, that this provision is in the context of admission of new carriers into the regulated industry. It has no direct application to determining the boundary line between private and for-hire carriage. But the avoidance of diversion was never an end of itself. Rather, it was a policy adopted in order to achieve an earlier regulatory objective of maintaining a stable traffic base for a relatively limited number of regulated carriers—an objective which has now been subordinated by Congress in the act in favor of heightened competition. Since fear of diversion of traffic from regulated to private carriers provided much of the motivation for the Commission's former policy, we think that Congress' lessened concern over traffic diversion can and should legitimately be considered in reappraising that policy.
>
> We also think that the 1980 Act, by reducing the barriers to the entry of new carriers into the regulated industry, has also reduced any incentive such carriers might have to devise subterfuges to remain outside the reach of regulation. See *Pacific Diesel*,

supra. Since the fear of subterfuges and evasion was a major part of the Commission's motivation in adopting its presumption of for-hire carriage in *Church*, *supra*, of control defeasance by owner-operators in *Oklahoma*, *supra*, and in scrutinizing owner-operator leases to shippers in subsequent cases, the greatly decreased incentives to evade regulation under the 1980 Act strongly suggest a reappraisal of both presumptions.

132 M.C.C. at 771.

Admittedly, the evidence adduced by the Commission in support of a change in circumstances is not overwhelming. A reading of the statutory language as well as the relevant House and Senate report suggests that when Congress was speaking of greater competition in the transportation industry, it was concerned primarily with competition *within the regulated* transportation industry. *See* S.Rep. No. 641, 96th Cong., 2d Sess. 2-6 (1980).[19]

Moreover, Congress' relaxed concerns for diversions of traffic from existing carriers might be read as limited to the context of determining whether to grant certificates

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[19] According to the Senate Committee, the central feature of the 1980 Act was the reduction of entry barriers into the regulated sector. This goal would be achieved primarily by lessening the "public necessity and convenience" requirement necessary to secure certification, and by creating a presumption that applicants would operate in the public necessity and convenience. Further, the amendment reduced the ICC's power to regulate motor carrier rates. However, the Committee stressed the need for "entry freedom" in order to "produce a competitive environment in which rates will not be excessively high." S.Rep. No. 641, *supra*, at 6. This reference to competitive environment apparently is addressed primarily to the regulated sector. The competitive environment would be achieved by balancing ease of entry with rate flexibility. *Id.* at 11. The House Report mirrors the Senate's concerns and goals. *See* H.R.Rep. No. 1069, *supra*, at 8-17, *reprinted in* 1980 U.S. Code Cong. & Ad. News 2290-99.

of public convenience and necessity. Thus, Congress' directive that the agency no longer consider diversion of traffic as itself inconsistent with public convenience and necessity may simply have been another mechanism for reducing barriers to entry *into the regulated sector. See* S.Rep. No. 641, *supra*, at 24. *See generally* 49 U.S.C.A. § 10922 (procedure and criteria to be used in issuing certificates to common carriers). In fact, greater leniency in determining whether a particular arrangement constitutes private carriage might be viewed as inconsistent with a congressional policy of *encouraging* entry into the regulated sector. *Cf.* S.Rep. No. 641, *supra*, at 116 (100% ownership requirement for intercorporate hauling "preserves the essential role of private carriage, but does so with a minimum of conflict with the common carrier concept").

Finally, it is not clear what inferences may be drawn from Congress' extension of certain specific exemptions in the 1980 Act. For example, although the amendments do allow intercorporate hauling by a wholly-owned subsidiary, Congress rejected proposals that would have allowed such hauling by less than wholly-owned subsidiaries. *See Economic Regulation of the Trucking Industry: Hearings Before the Committee of Commerce, Science, and Transportation on S. 2245*, 96th Cong., 2d Sess. 1463-64 (1980) (§ 8 of the Senate bill would have exempted intercorporate hauling from regulation when the parent corporation owned 51% of transporting subsidiary). Similarly, Congress rejected a proposal aimed specifically at allowing private carriers which transport exempt commodities on a "front haul" to carry nonexempt commodities on the back haul, thereby increasing carrying capacity and eliminating inefficiencies in the private carrier sector. *See id.* at 1461-63. *See also Economic Regulation of the Trucking Industry: Hearings before the Committee on Commerce, Science, and Transportation on S. 2245*, 96th Cong., 2d Sess. 1765-1810 (1980) (testi-

mony regarding back haul exemptions for "true owner/operators"). Further, in support of a provision in the 1980 Act exempting the transportation of processed food, the Senate specifically commented upon the extent to which private carriage had taken much of the business away from the regulated carriers:

> With respect to the motor carrier transportation of [processed, nonexempt food], almost 70 percent is transported today by private carriage. In other words, by their actions shippers in this country have indicated that the regulated motor carrier system is not meeting their needs to a substantial extent.

S.Rep. No. 641, *supra*, at 8. The foregoing language implies a continued concern for the diversion of traffic by private carriers from the regulated carrier industry.[20]

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[20] Various petitioners have asserted that in fact Congress considered and rejected proposals to accomplish what the Commission has here sought to do. Our review of the legislative materials, however, has not disclosed any specific proposals debated and rejected. Moreover, even if Congress had been confronted with such legislative proposals, we would not necessarily conclude that the Commission was precluded from acting on its own. In its report, the Senate stated:

> In addition to the specific provisions of this bill, there are other areas where the Committee did not act, either because it approved current Commission policy or felt that the Commission was the proper forum for the interested parties to address the issues.

S.Rep. No. 641, *supra*, at 4. This statement by Congress substantially weakens any argument that through its inaction Congress has prohibited the changes sought by the Commission in its policy statement. Petitioners argue further, however, that in effect this policy statement is an attempt to institute "master licensing" based on general findings and conclusions rather than individual adjudications. Congress specifically prohibited such an approach with regard to certification. *See* 49 U.S.C.A. § 10922(b). In our view, however, petitioners' contention is without merit. *See American Trucking Ass'n, Inc. v. United States*, 642 F.2d at 920-22.

In the end, however, we are mindful of the Commission's responsibility for reexamining its rules and policies in light of changed circumstances. *See American Trucking Associations v. Atchison, Topeka and Santa Fe Railway Co.*, 387 U.S. at 415-16, 87 S.Ct. at 1618 (Commission's flexibility and adaptability to changing needs and patterns of transportation are essential part of the office of regulatory agency; national transportation policy is yardstick by which correctness of Commission's actions will be measured). Thus, the Commission may reject long-standing policies, interpretations, and guidelines so long as its action is rationally based and consistent with the Commission's statute. *See, e.g., Atchison, Topeka & Santa Fe Railway Co. v. Wichita Board of Trade*, 412 U.S. at 808, 93 S.Ct. at 2375; *Mercury Motor Express, Inc. v. United States*, 648 F.2d at 319; *National Tour Brokers Association v. ICC*, 671 F.2d at 531-33. Moreover, in finding that changed circumstances reasonably permit a change in policy an agency is entitled to rely to some extent on the experience and expertise it has acquired during the course of its existence, *see Mercury Motor Express, Inc. v. United States*, 648 F.2d at 319; *National Tour Brokers Association v. ICC*, 671 F.2d 532-33, as long as this reliance on agency experience is documented and made a part of the record so that the courts can determine whether the agency's action is facially rational. *See Mercury Motor Express, Inc. v. United States*, 648 F.2d at 319; *National Tour Brokers Association v. ICC*, 671 F.2d at 533.

As discussed above, the proposed policy change is not inconsistent with the provisions of the Motor Carrier Act. Further, we find no clear error of judgment in the Commission's assertion that competition will be enhanced by the proposed relaxation of standards with respect to single-source leasing by shippers. Even if the amendments to the National Transportation Policy were concerned only with the regulated sector, it would be rational to assume that providing owner/operators alternatives to

employment solely with common and contract carriers would lead to greater competition for their services within that sector. Such competition would in turn foster a healthier transportation industry in both the regulated and unregulated sectors. *See National Tour Brokers Association v. ICC*, 671 F.2d at 533 (Commission may rely on experience as long as it fully explains perceptions supporting action, and makes its experience part of record).[21]

Recently, in *Mercury Motor Express, Inc. v. United States*, *supra*, a panel of the former Fifth Circuit considered a similar policy change. In *Mercury Motor* the Commission had announced that in light of changes in the industry it was abandoning its forty-year-old policy of denying incidental contract authority to private shippers. 648 F.2d at 317.[22] According to the Commission, the "dynamic expansion" of the motor carrier industry no longer supported the protectionist attitude behind the rule, while such factors as the need for energy efficiency clearly required reconsideration. The court thus held that the changed policy was consistent with the Motor Carrier Act and "rational on its face." *Id.* at 320. Here, too, we conclude that the Commission's assertion of changes in the industry, as supported by the National Transportation Policy, provides a rational basis for reconsidering and rejecting the presumptions announced in *Church* and *Oklahoma Furniture*.

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[21] It is important to reflect on the fundamental change rendered by the 1980 amendments to the Motor Carrier Act. From 1935 until the present, Congress has steadfastly adhered to the goal of a stable and efficient transportation system. From 1935 until 1980, the primary means for securing such a system was by protecting a relatively small pool of common and contract carriers. In 1980, however, Congress apparently decided that the goal of a stable and efficient system now could be attained by substantially greater competition.

[22] Under the rule of *Geraci Contract Carrier Application*, 7 M.C.C. 369 (1938), the Commission would generally deny common or con-

Petitioners contend that MC-122 will result in an increase in subterfuge to avoid regulation, and that the new criteria effectively destroy the distinctions between private and for-hire carriage. In our view, however, it is well within the Commission's area of expertise to postulate a decreased danger of subterfuge.[23] Further, the Commission has expressly declared that it intends to maintain the distinction between private and for-hire carriage, *see* 132 M.C.C. at 770, and that it will continue to ferret out for-hire schemes which purport to be private shipping. *Id.* at 772. In our view the better arena for holding the Commission to these promises and ensuring that its determinations are made in "a manner which transcends the merely formal," *United States v. Drum*, 368 U.S. at 375, 82 S.Ct. at 410, will be in the context of individual enforcement proceedings. We conclude that the new policy is a rational response to the Commission's findings of changed circumstances. *See Regular Common Carrier Conference of the American Trucking Associations, Inc. v. United States*, 628 F.2d at 252.[24]

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tract authority to a private shipper unless it could be shown that the incidental authority would in no way impinge upon the interests of existing regulated carriers. This rule was deemed necessary to protect a weak industry.

[23] It should be recalled that the danger of subterfuge was largely the cause for the Commission's heretofore strict reading of private carriage. Of course, should subterfuge continue as a threat to a stable and efficient regulated industry, we expect the Commission to respond accordingly.

[24] In *Regular Common Carrier Conference, supra*, a panel of the United States Court of Appeals for the District of Columbia Circuit approved a similar ICC policy change. The court added a *caveat*, however, which we deem particularly appropriate, and therefore adopt:

> We emphasize that, although we do not set aside the Commission's pronouncement, neither do we place an imprimatur on certain ambiguous—and perhaps legally unsound—comments in it. . . . [O]nly subsequent adjudications will reveal whether, as petitioners fear, the Commission is attempting to evade [a]

VI. Compliance With NEPA and EPCA.

Under the NEPA, agencies are required to consider possible environmental effects of proposed federal actions. Generally, this consideration takes the form of any Environmental Impact Statement (EIS). *See* 42 U.S.C.A. § 4332 (West 1977). Additionally, the EPCA requires

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statutory requirement . . . . If such an attempt is revealed, it will then be proper for a court to act.

628 F.2d at 252. In particular, we have some concern with some of the Commission's language which might be interpreted to place overwhelming significance upon the rather vague concept of "a complete transportation service," 132 M.C.C. at 773, as a prerequisite for finding for-hire carriage. The Commission describes this concept only as involving "key management and organizational functions that characterize a transportation company," including "dispatch, scheduling movements, and general coordination." *Id.* An overemphasis on this concept, and a pro-private carriage bias in the application thereof, could result in a complete blurring of the line between private and for-hire carriage. For example, there would be serious question about a finding of private carriage in the case of a single owner/operator who controlled all of his own activities subject only to a shipper's designation of a pick up time and place and a time and place of destination. Such an owner/operator would seem clearly, under any reasonable standard, to be hauling the goods of another; or conversely, the arrangement would seem clearly *not* to reflect a "shipper or manufacturer which transports its own goods." *Id.* at 787. And yet, we cannot be sure such an owner/operator, who in effect manages and schedules only his own activities, would fall clearly within the "complete transportation service" concept. Our concern is alleviated to a great extent by the fact that the Commission's decision also places significant reliance on whether or not the shipper exercises *control* and *responsibility*, and on the Commission's assurances that the determination will be based upon the totality of the circumstances, that the practical distinction between private and for-hire carriage will be maintained, and that subterfuges will not be tolerated. Moreover, litigants will be free to challenge the Commission's application of the instant policy in individual enforcement proceedings.

We are satisfied that the Commission's policy, if applied in a reasonable manner, is a rational response to changed circumstances, and is within the range of responsibility assigned the Commission by Congress.

the ICC to consider the possible effect of its actions on reducing energy consumption. When necessary, this requirement includes preparing a Statement of Energy Impact (SEI). *See* 42 U.S.C.A. § 6362(b) (West 1977). The obligations to prepare an EIS and an SEI, however, are not mandatory. Rather, the requirements of the NEPA are triggered only for "major federal actions significantly affecting the quality of the human environment," 42 U.S.C.A. § 4332(2)(C), and the EPCA requires an energy statement only where practicable. 42 U.S.C.A. § 6362(b). Thus, with regard to both Statements, the Commission is accorded a large amount of discretion in determining either the necessity for preparing the Statement or the scope of the inquiry it will perform. *See Mercury Motor Express, Inc. v. United States*, 648 F.2d at 319-20 (decision by Commission that action is neither major federal action significantly effecting human environment nor major regulatory action under the EPCA is reversible only if arbitrary, capricious or abuse of discretion); *American Trucking Association, Inc. v. United States*, 642 F.2d at 923 (5th Cir. 1981) (agency may reasonably conclude that impact statement not necessary); *Sierra Club v. Hassell*, 636 F.2d 1095, 1098 (5th Cir. 1981) (Unit B). We conclude that the agency's determination that the proposed action is expected to reduce fuel consumption in the industry was sufficient under the EPCA. Further, the Commission's conclusion that no environmental impacts are expected comports with the Commission's own regulations and general practice. *See* 49 C.F.R. §§ 1105.6, 1106.5.

CONCLUSION

On the basis of the foregoing, the petitions for review of MC-122 are DENIED.

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 82-5247 & 82-8133

RYDER TRUCK LINES, INC., and
BOWMAN TRANSPORTATION, INC., *et al.*,
Petitioners,

versus

UNITED STATES OF AMERICA and
INTERSTATE COMMERCE COMMISSION,
Respondents.

Petition for Review of an Order of the
Interstate Commerce Commission

[Filed Nov. 17, 1983]

ORDER:

( ) The motion of petitioners, Bowman Transportation and Ryder Truck Lines for ☒ stay ☐ recall and stay of the issuance of the mandate pending petition for writ of certiorari is DENIED.

(✓) The motion of petitioners, Bowman Transportation and Ryder Truck Lines for ☒ stay ☐ recall and stay of the issuance of the mandate pending petition for writ of certiorari is GRANTED to and including December 5, 1983, the stay to continue in force until the final disposition of the case by the

Supreme Court, provided that within the period above mentioned there shall be filed with the Clerk of this Court the certificate of the Clerk of the Supreme Court that the certiorari petition has been filed. The Clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon the expiration of the stay granted herein, unless the above mentioned certificate shall be filed with the Clerk of this Court within that time.

( ) The motion of _____ for a further stay of the issuance of the mandate is GRANTED to and including _____, under the same conditions as set forth in the preceding paragraph.

( ) IT IS ORDERED that the motion of _____ for a further stay of the issuance of the mandate is DENIED.

/s/ [Illegible]
United States Circuit Judge

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 82-5247 & 82-8133

RYDER TRUCK LINES, INC. and
BOWMAN TRANSPORTATION, INC., *et al.*,
Petitioners,

versus

UNITED STATES OF AMERICA and
INTERSTATE COMMERCE COMMISSION,
Respondents.

[Filed Dec. 1, 1983]

Petition for Review of An Order
of the Interstate Commerce Commission

ORDER:

( ) The motion of _____
for ☐ stay ☐ recall and stay of the issuance of the mandate pending petition for writ of certiorari is DENIED.

( ) The motion of _____
for ☐ stay ☐ recall and stay of the issuance of the mandate pending petition for writ of certiorari is GRANTED to and including _____, the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within the period above mentioned there shall be filed with the

Clerk of this Court the certificate of the Clerk of the Supreme Court that the certiorari petition has been filed. The Clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon the expiration of the stay granted herein, unless the above mentioned certificate shall be filed with the Clerk of this Court within that time.

(×××) The motion of petitioners, Ryder Truck Lines & Bowman Transportation for a further stay of the issuance of the mandate is GRANTED to and including December 7, 1983, under the same conditions as set forth in the preceding paragraph.

( ) IT IS ORDERED that the motion of _____ _____ for a further stay of the issuance of the mandate is DENIED.

/s/ R. Lanier Anderson
United States Circuit Judge

APPENDIX E

STATUTES

Section 10101 of Title 49 is the National Transportation Policy and provides as follows:

§ 10101. Transportation policy

(a) Except where policy has an impact on rail carriers, in which case the principles of section 10101a of this title shall govern, to ensure the development, coordination, and preservation of a transportation system that meets the transportation needs of the United States, including the United States Postal Service and national defense, it is the policy of the United States Government to provide for the impartial regulation of the modes of transportation subject to this subtitle, and in regulating those modes—

(1) to recognize and preserve the inherent advantage of each mode of transportation;

(2) to promote safe, adequate, economical, and efficient transportation;

(3) to encourage sound economic conditions in transportation, including sound economic conditions among carriers;

(4) to encourage the establishment and maintenance of reasonable rates for transportation without unreasonable discrimination or unfair or destructive competitive practices;

(5) to cooperate with each State and the officials of each State on transportation matters;

(6) to encourage fair wages and working conditions in the transportation industry; and

(7) with respect to transportation of property by motor carrier, to promote competitive

and efficient transportation services in order to (A) meet the needs of shippers, receivers, and consumers; (B) allow a variety of quality and price options to meet changing market demands and the diverse requirements of the shipping public; (C) allow the most productive use of equipment and energy resources; (D) enable efficient and well-managed carriers to earn adequate profits, attract capital, and maintain fair wages and working conditions; (E) provide and maintain service to small communities and small shippers; (F) improve and maintain a sound, safe, and competitive privately-owned motor carrier system; (G) promote greater participation by minorities in the motor carrier system; and (H) promote intermodal transportation.

(b) This subtitle shall be administered and enforced to carry out the policy of this section.

Sections 10102 (11), (12) and (13) (B) of Title 49 define motor carrier, motor common carrier and motor contract carrier of property as follows:

(11) "motor carrier" means a motor common carrier and a motor contract carrier.

(12) "motor common carrier" means a person holding itself out to the general public to provide motor vehicle transportation for compensation over regular or irregular routes, or both.

(13) "motor contract carrier" means—

(B) a person providing motor vehicle transportation of property for compensation under continuing agreements with one or more persons—

(i) by assigning motor vehicles for a continuing period of time for the exclusive use of each such person; or

(ii) designed to meet the distinct needs of each such person.

Section 10102(14) defines a motor private carrier as follows:

> (14) "motor private carrier" means a person, other than a motor carrier, transporting property by motor vehicle when—
>
> (A) the transportation is as provided in section 10521(a)(1) and (2) of this title;
>
> (B) the person is the owner, lessee, or bailee of the property being transported; and
>
> (C) the property is being transported for sale, lease, rent, or bailment, or to further a commercial enterprise.

Section 5 of the MCA, 94 Stat. 794-796, amended 49 U.S.C. § 10922 in pertinent part as follows:

> (b)(1) Except as provided in this section, the Interstate Commerce Commission shall issue a certificate to a person authorizing that person to provide transportation subject to the jurisdiction of the Commission under subchapter II of chapter 105 of this title as a motor common carrier of property if the Commission finds—
>
> (A) that the person is fit, willing, and able to provide the transportation to be authorized by the certificate and to comply with this subtitle and regulations of the Commission; and
>
> (B) on the basis of evidence presented by persons supporting the issuance of the certificate, that the service proposed will serve a useful public purpose, responsive to a public demand or need;
>
> unless the Commission finds, on the basis of evidence presented by persons objecting to the issuance of a certificate, that the transportation to be authorized by the certificate is inconsistent with the public convenience and necessity.

(2) In making a finding under paragraph (1) of this subsection, the Commission shall consider and, to the extent applicable, make findings on at least the following:

(A) the transportation policy of section 10101(a) of this title; and

(B) the effect of issuance of the certificate on existing carriers, except that the Commission shall not find diversion of revenue or traffic from an existing carrier to be in and of itself inconsistent with the public convenience and necessity.

(3) The Commission may not make a finding relating to public convenience and necessity under paragraph (1) of this subsection which is based upon general findings developed in rulemaking proceedings.

(4) The provisions of paragraph (1) of this subsection (other than subparagraph (A)) shall not apply to applications under this subsection for authority to provide—

(A) transportation to any community not regularly served by a motor common carrier of property certificated under this section;

(B) transportation services which will be a direct substitute for abandoned rail service to a community if such abandonment results in such community not having any rail service and if such application is filed within 120 days after such abandonment has been approved by the Commission;

(C) transportation for the United States Government of property other than used household goods, hazardous or secret materials, and sensitive weapons and munitions;

(D) transportation of shipments weighing 100 pounds or less if transported in a motor vehicle in which no one package exceeds 100 pounds; and

(E) transportation by motor vehicle of food and other edible products (including edible by-products but excluding alcoholic beverages and drugs) intended for human consumption, agricultural limestone and other soil conditioners, and agricultural fertilizers if—

(i) such transportation is provided with the owner of the motor vehicle in such vehicle, except in emergency situations; and

(ii) after issuance of the certificate, such transportation (measured by tonnage) does not exceed, on an annual basis, the transportation provided by the motor vehicle (measured by tonnage) which is exempt from the jurisdiction of the Commission under section 10526(a)(6) of this title and the owner of the motor vehicle certifies to the Commission annually that he is complying with the provisions of this clause and provides to the Commission such information and records as the Commission may require.

Section 7 of the MCA, 94 Stat. 797, amended 49 U.S.C. § 10526(a)(6) in pertinent part as follows:

§ 10526. Miscellaneous motor carrier transportation exemptions

(a) The Interstate Commerce Commission does not have jurisdiction under this subchapter over—

(6) transportation by motor vehicle of—

(A) ordinary livestock;

(B) agricultural or horticultural commodities (other than manufactured products thereof);

(C) commodities listed as exempt in the Commodity List incorporated in ruling numbered 107, March 19, 1958, Bureau of Motor Carriers, Interstate Commerce Commission, other than frozen fruits, frozen berries, frozen vegetables, cocoa beans, coffee beans, tea, bananas, or hemp, or wool imported from a foreign country, wool tops and noils, or wool waste (carded, spun, woven, or knitted);

(D) cooked or uncooked fish, whether breaded or not, or frozen or fresh shellfish, or by-products thereof not intended for human consumption, other than fish or shellfish that have been treated for preserving, such as canned, smoked, pickled, spiced, corned, or kippered products; and

(E) livestock and poultry feed and agricultural seeds and plants, if such products (excluding products otherwise exempt under this paragraph) are transported to a site of agricultural production or to a business enterprise engaged in the sale to agricultural producers of goods used in agricultural production;

Section 9 of the MCA, 94 Stat. 798-799, amended 49 U.S.C. § 10524 as follows:

(b) The Commission does not have jurisdiction under this subchapter over transportation of property by motor vehicle for compensation provided by a person who is a member of a corporate family for other members of such corporate family if—

(1) the parent corporation notifies the Commission of its intent or one of its subsidiaries' intent to provide the transportation;

(2) the notice contains a list of participating subsidiaries and an affidavit that the parent corporation owns directly or indirectly a 100 percent interest in each of the subsidiaries;

(3) the Commission publishes the notice in the Federal Register within 30 days of receipt; and

(4) a copy of the notice is carried in the cab of all vehicles conducting the transportation.

(c) In this section, "corporate family" means a group of corporations consisting of a parent corporation and all subsidiaries in which the parent corporation owns directly or indirectly a 100 percent interest.

Section 10(a)(2) of the MCA, 94 Stat. 800, amended 49 U.S.C. § 10923 in pertinent part as follows:

(5)(A) The provisions of paragraph (2) of subsection (a) of this section and paragraph (3) of this subsection shall not apply to applications under this section for authority to provide transportation by motor vehicle of food and other edible products (including edible byproducts but excluding alcoholic beverages and drugs) intended for human consumption, agricultural limestone and other soil conditioners, and agricultural fertilizers if—

(i) such transportation is provided with the owner of the motor vehicle in such vehicle, except in emergency situations; and

(ii) after issuance of the permit, such transportation (measured by tonnage) does not exceed, on an annual basis, the transportation pro-

vided by the motor vehicle (measured by tonnage) which is exempt from the jurisdiction of the Commission under section 10526(a)(6) of this title and the owner of the motor vehicle certifies to the Commission annually that he is complying with the provisions of this subparagraph and provides to the Commission such information and records as the Commission may require.

APPENDIX F

THE WALL STREET JOURNAL, *Monday, October 24, 1983*

LEASEWAY ANNOUNCES
YET ANOTHER WAY
TO INCREASE
YOUR DISTRIBUTION PRODUCTIVITY.

The Interstate Commerce Commission now allows you to lease your drivers and your trucks from a single source. You could always lease a driver. You could always lease a truck. Now lease *both* from Leaseway Transportation, a company experienced in each for more than 25 years.

Here are just four of our 29 reasons for a Single Source Lease:

- Freedom from recruitment, training, and management of drivers
- Insulation from labor negotiations
- Reduced operating and administrative costs
- Increased labor and equipment productivity

Leaseway Transportation employs more than 8,000 drivers and 78,000 vehicles. We are the *only* national company with a proven record in leasing both. And we are ready to meet your needs now.

Don't wait. Call Lee Lazar for all the reasons you should get a Single Source Lease from Leaseway Transportation. 800-321-8970. In Ohio, call 216-464-3300.

LEASEWAY TRANSPORTATION
3700 Park East Drive, Cleveland, OH 44122

APPENDIX G

The following is a list of companies which, as of December 31, 1981, were affiliated to Ryder Truck Lines, Inc. through its parent company, IU International Corporation:

IU International Corporation
- Biggers Brothers, Inc.
- Conversion Systems, Inc.
  - Earth Management, Inc.
  - Envirosafe Services, Inc.
    - Envirosafe Services of Texas, Inc.
  - Envirosafe Services of Idaho, Inc.
  - Fox Hunt Farms, Inc.
  - IUCS (Texas), Inc.
  - IU Technology Corporation
  - Narvon Products Corp.
- Corporacion Chatarraven, C.A.
- Echo Bay Mines Ltd.
- Edmonton Telephone Answering Service Ltd.
- Envirosafe, Inc.
- Expressway Transportation System Inc.
  - Nationwide Express System, Inc.
- General Waterworks Corporation
  - Bethel Township Water Company
  - Boise Water Corporation
    - Hoosier Water Company, Inc.
    - West Lafayette Water Company, Inc.
      - Lincoln Water Company
      - Orida Investment Corporation
  - Butler Township Water Company
  - Capital City Water Company
  - Caribou Water Works Corporation
  - Citizens Water Supply Company of Newtown, The
  - Clearview Water Supply Company
  - Clymer Citizens Water Company
  - Colorado Utility Management Corporation
    - Preston Utilities Corporation

Dauphin Consolidated Water Supply Company
East McKeesport Water Company
Eastport Water Company
Ellsworth Water Company
Freeport Water Company
G.W.C. Data Service Corporation
GW Service Corp.
Galeton-Eldred Water Company
General Securities Corp.
General Waterworks Corporation of Pine Bluff, Arkansas, Inc.
General Waterworks Management and Service Company
Greenville Water Company
High Ridge Water Supply Company
Illinois Municipal Water Company
Jacksonville Suburban Utilities Corporation
Jersey Shore Water Company
Lambertville Water Company
MTL Corporation
Mars Hill & Blaine Water Company
Mechanic Falls Water Company
Mechanicsburg Water Company
Millinocket Water Company
New Milford Water Company, The
New Rochelle Water Company, The
Newtown Water Company, The
North Berwick Water Company, The
Octoraro Water Company
Russellville Water Company, Inc.
Skowhegan Water Company
South Gate Water & Sewer Co., Inc.
Stewartstown Water Company
2522 Covington Street Corporation
Toms River Water Company
Owego Water Works
Nichols Water Company

Trevorton Water Company, The
Wakefield Water Company
Warrenville Water Company
Wilmington Suburban Water Corporation
Woodbury Water Company, The
Wrightsville Water Supply Company
IMS Holdings, Inc.
IMS Caribbean Operations Ltd.
IMS Intermetal de Chile Limitada
IMS Japan Ltd.
Intermetal Mexicana S.A.
International Metal Recovery, Inc.
International Mill Service, Inc.
Beaver County Trucking, Inc.
H. and H. Equipment Corp.
Hackett, Clarence A., Inc.
New Bridge Development Company
International Utilities Corporation
International Utilities Overseas Capital Corporation
IU International Holdings Limited
IMS Lycrete, Inc.
Cleveland Machine Hire Limited
IMS Lycrete Egypt, Ltd.
IMS Lycrete Limited
IMS Lycrete (London) Limited
Lycrete Limited
Minseco Limited
Road Materials (Middlesbrough) Limited
IMS Lycrete France, S.A.
IMS Nordiska International Mill Service AB
IMS Rautohuolto OY
IMS Lycrete S.A.
IMS-Schlacken-und Metallaufbereitung GmbH
IMS-Sodynad Holdings, S.A.
IMS-Sodynad, s.a.r.l.

IMS Teeside Ltd.
Engineering & Metal Recovery Limited
Movig Limited
Lifermag S.A.
Loyquip S.A.
IU Finance Canada Limited
IU Barbados Limited
IU Liberian Finance Company
I.U. Overseas Finance N.V.
Pagette Airsignals Ltd.
Distacom Communications (Alta.) Ltd.
Sociedade Brasileira de Recuperacao de Metais (Sobremetal) Ltda.
IU International Management Corporation
IU Europe, Ltd.
IU Investment Corporation
C. Brewer and Company, Limited
Agrex Engineering Co., Ltd.
Empresa Agropecuaria Patzulin, S.A.
Agri-Spices International, Inc.
Empresa Agricola El Pacayal, S.A.
Agrobusiness Company, Limited
CARIBLANCO S.A.
BioEnergy Development Corporation
Brewer Chemical Corporation
Brewer Farms, Inc.
Brewer, Inc.
Brewer Orchards (South Pacific) Inc.
Brewer Properties, Inc.
Brewer Solomons, Inc.
Brewer Solomons Agriculture Limited
Brewer Support Housing, Inc.
Guatrex Services, Ltd.
Agronomicas de Guatemala, S.A.
Industria Guatemalteca de Macadamia, S.A. (Inguamasa)

Hawaiiana Investment Co., Inc.
Hawaiiana Modular Co., Inc.
Kilauea, C.B., Inc.
Kilauea Irrigation Co., Inc.
Punalu'u Water and Sanitation Corporation
Volcano Golf & Country Club, Inc.
Hawaiian Insurance & Guaranty Company, Limited, The
Guardian Financial Corporation
Guardian Life Underwriters, Inc.
Independent Adjustment, Inc.
United National Insurance Company, Limited
Hilo Transportation & Terminal Co., Inc.
Ka'u Sugar Company, Inc.
Kilauea Agronomics, Inc.
Kilauea Sugar Company, Limited
Mauna Kea Sugar Company, Inc.
Hilo Coast Processing Company
Mauna Loa Macadamia Nut Corporation
Monte de Oro, S.A.
NAMOLCO INC.
International Molasses Limited
Namolco AG
Namolco GmbH
Namolco S.r.l.
Namolco de Mexico, S.A.
Namolco (Panama) S.A.
Willow Grove Shipping Company Limited
Olokele Sugar Company, Limited
Pigeon Point Research Center, Inc.
Seamountain-Hawaii Ranch Company, Inc.
South Pacific Agronomics Company
Wailuku Sugar Company

IU North America Finance, Inc.
IU Oil & Gas Limited
I.U. Overseas Transportation Ltd.
IU Transportation Services, Inc.
- Atlantic Direct Service, Inc.
- IU International Oil & Gas, Inc.
- IU Resolute Corporation
- Pacific Intermountain Express Co.
  - All States Terminals, Inc.
  - All States Trucking, Inc.
  - Intermountain Terminal Company
  - Metric Associates
  - P.I.E. Air Freight Forwarding, Inc.
  - P.I.E. Forwarding, Inc.
  - P.I.E. Transport A/S
    - P.I.E. Transport AB
    - P.I.E. Transport A/S
    - P.I.E. Transport OY
  - P.I.E. Transport, Inc.
  - R-X Consolidators, Inc.
  - Tyrco Industries
  - Vanguard Contract Carrier Inc.
  - X-M Truck Brokers, Inc.
- Round Valley, Inc.
  - Beaver Brook Land Company
    - Beaver Brook Country Club, Inc.
  - Round Valley Realty, Inc.
- Ryder Truck Lines, Inc
  - Helm's Salvage, Inc.
  - O.N.C. Forwarding
  - RTL Holdings, Inc.
  - Ryder Forwarding, Inc.
  - Ryder Truck Lines, Ltd
  - Transportation Teleprocessing Systems, Inc.

IUUK Corporation
Special Carriers, Inc.
- Customized Transportation, Inc.
- Gemini Trucking, Inc.

Independent Freightways, Inc.
Pioneer Trucking, Inc.
Special Carriers Leasing, Inc.
Telephone Answering Service Limited
Unijax, Inc.
Coachman Insurance Company, The
Cyclejack, Inc.
Hobart-McIntosh Paper Company
IU Air Service, Inc.
IU Land Corporation
IU Land Development Corporation
Nosroc Corp.
PAC Finance Corporation
P.I.E. International, Inc.
P.I.E. International AB
Signature Brands, Inc.
Southwest Fabricating & Welding Co., Inc.
Trans-Services Investment Corporation
Unijax Realty Company
Valve Systems International, Inc.
VSI (Valve Systems International) Limited
Hills-McCanna Company
Hills-McCanna Canada, Ltd.
Hills-McCanna Limited

Office - Supreme Court, U.S.
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MAR 8 1984
ALEXANDER L. STEVAS
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Nos. 83-943, 83-1030, and 83-1119

In the Supreme Court of the United States

OCTOBER TERM, 1983

AMERICAN TRUCKING ASSOCIATIONS, INC., ET AL.,
PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

RYDER TRUCK LINES, INC., PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

NATIONAL ASSOCIATION OF
REGULATORY UTILITY COMMISSIONERS, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

JOHN BROADLEY
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ROBERT S. BURK
Deputy General Counsel
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Interstate Commerce Commission
Washington, D.C. 20423

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTION PRESENTED

Whether the Interstate Commerce Commission's revised policy for deciding if particular leasing arrangements constitute regulated or exempt motor carriage is consistent with the Interstate Commerce Act.

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In the Supreme Court of the United States

OCTOBER TERM, 1983

No. 83-943

AMERICAN TRUCKING ASSOCIATIONS, INC., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

No. 83-1030

RYDER TRUCK LINES, INC., PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

No. 83-1119

NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 59a-93a)[1] is reported at 716 F.2d 1369. The decision of the Interstate Commerce Commission (Pet. App. 1a-58a) is reported at 132 M.C.C. 756.

JURISDICTION

The judgment of the court of appeals was entered on October 11, 1983. The petition for a writ of certiorari in No. 83-943 was filed on December 7, 1983, the petition in No. 83-1030 was filed on December 22, 1983, and the petition in No. 83-1119 was filed on January 6, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Since the enactment of the Motor Carrier Act of 1935, ch. 498, 49 Stat. 543 *et seq.* (now codified, as amended, at 49 U.S.C. (Supp. V) 10101 *et seq.*), the Interstate Commerce Commission has had regulatory authority over motor transportation "for-hire." On the other hand, "private carriage" (*i.e.*, transporting one's own goods) has been exempted from regulation. Because the Act defines these two types of transportation in general terms,[2] the Commission has had the difficult task of establishing a precise boundary between them. The Commission has had particular difficulty drawing this distinction in cases involving shippers that transport their goods with vehicles and

[1] "Pet. App." refers to the appendix to the petition in No. 83-943.

[2] See 49 U.S.C. (Supp. V) 10102(12), (13) and (14). The original 1935 Act did not provide a substantive definition of private carriage (Pet. App. 61a).

drivers leased from a single source. The problem arises because single source leases resemble for-hire carriage in that the shipper pays a non-employee to transport its goods in vehicles the shipper does not own.[3]

The Commission first addressed the problem in *H. B. Church Truck Service Co.—Com. Car. Application*, 27 M.C.C. 191 (1940). There, two shippers leased trucks and drivers from Church. In addition to providing the trucks and drivers, Church also painted the trucks to the shippers' specifications, maintained the vehicles, paid all operating expenses, and carried public liability and property insurance. Acknowledging the difficulty of drawing the lines between for-hire and private carriage in these circumstances, the Commission said that the key test of private carriage was whether the shipper had the right to "control, direct, and dominate the performance of the service." 27 M.C.C. at 195. Because the Commission found that the public interest (as embodied in the Motor Carrier Act of 1935) required diligence to prevent evasion of regulation through subterfuges, it decided to implement its "control" test by creating a rebuttable presumption of for-hire carriage when a shipper leases trucks and drivers from a single source. The presumption would yield "to a showing that the shipper has the exclusive right and privilege of directing and controlling the transportation service, as,

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[3] The Commission has consistently found that leases to shippers of trucks and drivers from separate sources do not constitute for-hire carriage. *Rittenhouse—Investigation of Certificate*, 78 M.C.C. 389 (1958); *Cummings Truck Lease, Inc., Investigation of Operations*, 81 M.C.C. 283 (1959); *Personnel Service, Inc.—Investigation*, 110 M.C.C. 695 (1969).

for example, if the equipment were operated by the shipper's employee" (27 M.C.C. at 196).

The Commission subsequently refined its single source lease policy in *Pacific Diesel Rental Co.—Investigation of Operations*, 78 M.C.C. 161, 172 (1958). In that case, the Commission articulated an alternative version of the "control" test by asking whether the lease operations were "in substance" for-hire carriage. This "substance" test, which simply called for an examination of all the circumstances surrounding a particular operation, evolved into a separate and additional test when the Commission addressed another particular leasing arrangement in *Oklahoma Furniture Mfg. Co.—Investigation of Operations*, 79 M.C.C. 403, 409-410 (1959).

The owner-operators of the leased vehicles in *Oklahoma Furniture* became employees of the shipper, and their leases made them responsible for all operating costs and the risk of loss of the equipment. The shipper maintained the equipment, complied with safety regulations, provided public liability and cargo insurance, and reserved the exclusive right to direct and control the operations. Nevertheless, the Commission —applying a new presumption—concluded that the arrangement constituted for-hire carriage. The Commission found that the shipper did not in fact have exclusive control because "[t]here is present, whenever the owner-operator drives his own equipment, the right and power of the lessor to defeat any supposed right to control that the shipper-lessee may believe exists." 79 M.C.C. at 411. Given this apparent absence of exclusive control, the Commission found the operation to be for-hire carriage because the owner-operators provided and maintained the equipment, guaranteed a fixed cost of transportation, bore

the risks of delays and breakdowns, and met all costs of operation, whereas the shipper only paid for insurance and exercised some control over the owner-operators.

A three-judge district court reversed the Commission. *Drum* v. *United States*, 193 F. Supp. 275 (W.D. Okla. 1960). In *United States* v. *Drum*, 368 U.S. 370 (1962), however, this Court reversed the district court and upheld the Commission's decision. Noting that the Commission has traditionally been obliged to draw the line between for-hire and private carriage, the Court held that the statutory definitions of private and for-hire carriage required that "a purported private carrier who hires the instrumentalities of transportation from another must—if he is not to utilize a licensed carrier—assume in significant measure the characteristic burdens of the transportation business." 368 U.S. at 374-375. The Court endorsed the Commission's "control" and "substance" test for determining if those burdens had been assumed (*id.* at 384), and it affirmed the Commission's conclusion that the owner-operators qualified as for-hire carriers because they had assumed such "characteristic burdens" as large capital investment, risk of increases in variable costs and risk of loss or non-utilization of the high-priced equipment. *Id.* at 379-380. The Court made it clear, however, that it was affirming an exercise of agency discretion, and was not itself drawing the line between regulated and exempt carriage (*id.* at 384, 385); indeed, the Court explicitly criticized the district court for attempting to substitute its judgment for that of the agency. *Id.* at 385-386.

Following *Drum*, the Commission continued to develop its approach to single source leasing by applying the "control" and "substance" test to particular

single source leasing arrangements. Shortly after this Court's *Drum* decision, the Commission, in *Lovell—Investigation of Operations*, 92 M.C.C. 728 (1963), redefined the "characteristic burdens" of transportation by deemphasizing the financial risks the Commission had considered critical in *Drum*, focusing instead on issues of control and responsibility. 92 M.C.C. at 734-736. Applying this modified analysis, the Commission found that the single source lease in question created exempt private carriage. In two other post-*Drum* cases, *Rayette, Inc.—Investigation of Operations*, 108 M.C.C. 410 (1969) and *Ontario Co.—Declaratory Order*, 112 M.C.C. 211 (1970), the Commission applied a similar analysis and found that the arrangements constituted private carriage.[4]

In sum, prior to 1980 the Commission exempted from regulation single source leasing by private carriers only if all of the circumstances showed that the operation, in substance, was not a for-hire transportation service provided by an unlicensed carrier. The most significant elements of the policy were its presumptions (1) that single source leasing constituted for-hire carriage; and (2) that an owner-operator was capable of exerting ultimate control over the transportation service (and thus would be deemed to be providing for-hire carriage) unless he became the shipper's employee.

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[4] Courts have also considered single source leases in enforcement actions (brought directly by the Commission or at the Commission's request), in actions to review Commission leasing decisions, and in tax cases. The courts generally have applied the Commission's "control" and "substance" test, finding for-hire carriage whenever the arrangement in question imposed no more burdens on a shipper than those normally involved with contract carriage.

2. In July 1980, Congress enacted the Motor Carrier Act of 1980, Pub. L. No. 96-296, 94 Stat. 793 *et seq.* The new Act ended the 1935 Act's protective policy toward regulated carriers. In addition, it permits private carriers to engage in compensated intercorporate hauling among wholly-owned members of a corporate family. 49 U.S.C. (Supp. V) 10524(b) and (c). The Act also aids owner-operators by expanding the number of commodities they may haul without a license (49 U.S.C. (Supp. V) 10526(a)(6), (11), (12) and (13)), and by permitting owner-operators to obtain ICC authority to haul food under a simplified licensing standard. 49 U.S.C. (Supp. V) 10922(b)(4)(E).

The new Act's reduced concern for protecting regulated carriers' traffic against competition, and its grant of increased flexibility to private carriers, prompted the Commission to consider modifying the single source leasing policy it had developed to implement the 1935 Act. In a proceeding styled *Ex parte No. MC-122 (Sub-No. 2)*, the Commission proposed a return to the original control test articulated in *H. B. Church, supra*, with control being measured by the same control criteria used to govern owner-operator leasing to for-hire carriers.[5] A variety of interested parties, including owner-operators, regulated carriers, shippers (many operating private truck fleets), associations of shippers and carriers, and the United

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[5] Regulated carriers can lease drivers and vehicles from a single source under Commission regulations. 49 C.F.R. 1057. One of the requirements is that the regulated carrier control the service to the same extent as if he owned the vehicles, although he needs to control the vehicles only to the extent necessary to be responsible to the shipper, the public, and the Commission (Pet. App. 34a).

States Department of Transportation filed comments. Petitioners Ryder Truck Lines, Inc. (Ryder), American Trucking Associations, Inc., et al. (ATA), and National Association of Regulatory Utility Commissioners (NARUC) opposed any change in policy.

In March 1982, the Commission issued a policy statement articulating a revised policy toward single source leasing (Pet. App. 1a-58a). Under the new policy, as under the old, the Commission will examine all of the circumstances surrounding a lease arrangement to ascertain whether the shipper is bearing the "characteristic burdens of transportation" and to determine if the lessor is offering what is in substance a complete transportation service. The Commission redefined the "characteristic burdens of transportation," however, to be the control, responsibility, and management burdens necessary to make trucks and drivers part of a functioning private transportation operation. In addition, the Commission eliminated the presumption that all single source leases constitute for-hire carriage and abandoned its earlier position that an owner-operator must become the shipper's employee before a single source lease arrangement would be considered private carriage.

The Commission reduced its new policy to six requirements, which, if accurately reflected in actual lease operations, would raise a rebuttable presumption that the operation constitutes private carriage.[6] The six requirements are (Pet. App. 34a-37a):

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[6] To reduce uncertainty about future lease arrangements, the Commission provided sample lease language incorporating the six minimum criteria, and stated that a lease containing the sample language would raise a rebuttable presumption that the arrangement is private carriage (Pet. App. 57a-58a).

(1) exclusive commitment of the equipment to the shipper's use for the term of lease;

(2) exclusive shipper dominion and control over the transportation service during the lease term;

(3) assumption by the shipper of responsibility to the public for injury caused during performance of the transportation service;

(4) complete shipper responsibility for compliance with safety regulations;

(5) shipper responsibility for cargo loss; and

(6) a minimum lease term of 30 days.

The Commission also listed ten additional factors that it would consider relevant, but not controlling, on the issue whether the shipper has assumed the degree of control necessary to turn a single source lease into true private carriage.[7]

3. The court of appeals affirmed the Commission's decision in all respects (Pet. App. 59a-95a). Although the Commission had rejected further use of its previous presumptions, the court recognized (*id.* at 67a) that, in essence, the Commission had only reformulated the criteria to be applied in determining whether particular lease arrangements are private or for-hire carriage. Thus, the Commission had retained

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[7] These additional factors are whether: (1) the lease is written; (2) the lease is for round trips; (3) the driver becomes the shipper's employee; (4) the vehicle is sometimes driven by someone other than the owner-operator; (5) the lease covers both tractors and trailers; (6) the shipper assumes the risk of the equipment's loss; (7) the private carrier shipper pays for fuel, tolls, etc.; (8) the lessor must repair and maintain the equipment; (9) the lease provides for a minimum payment regardless of use; and (10) the shipper is helping to finance purchase of the equipment (Pet. App. 37a-40a).

its traditional test of control and it remained free under this test to decide each case in light of actual operations and all the relevant facts (*id.* at 69a, 73a, 78a, 81a).

The court of appeals held that the Commission could reformulate the criteria for distinguishing for-hire from private carriage because there was no indication that Congress in the Motor Carrier Act of 1980 intended to restrict the Commission to the definitions and presumptions applied in the past (Pet. App. 75a-76a). The court also held that this Court's *Drum* decision did not require the agency to continue using either the rejected presumptions or the previously defined "burdens." To the contrary, the court of appeals held (Pet. App. 77a) that "[o]verall, * * * the [*Drum*] opinion reflects a deference to the Commission's informed judgment as to what types of burdens are characteristic of the provision of for-hire transportation." Because the Commission's rejection of the old presumptions only indicated its new views as to which burdens constitute significant indicia of private carriage, the court of appeals found that the Commission had acted within the limits of its authority (Pet. App. 78a).

Having held that the Commission could revise its single source leasing policy, the court of appeals held that the new policy has a rational basis. The court relied upon the Commission's obligation to reexamine its policies in light of changed circumstances (Pet. App. 89a), and it noted that the Commission here reasonably cited changes in both the Motor Carrier Act and the motor carrier industry to justify its new position (Pet. App. 80a-81a). The court agreed with the Commission's conclusion that entry into regulated carriage is now far easier than it was under the old

Act, and that, accordingly, the danger of evasion of regulation was much reduced. The court also found that the new National Transportation Policy, as modified by the 1980 Act, supports the Commission's new policy, which should foster greater competition within the regulated industry for the services of owner-operators (Pet. App. 89a-90a), and should result in a healthier motor carrier industry.

Finally, the court of appeals rejected petitioners' claims that the new policy would inevitably result in an impermissible blurring of the line between for-hire and private carriage (Pet. App. 91a). Instead, the court held that individual enforcement proceedings are the appropriate forum for ensuring that the Commission actually applies the new policy in a manner consistent with the statutory differences between for-hire and private carriage (*ibid.*).[8]

ARGUMENT

The court of appeals correctly held that the Commission's new policy—which has not yet been applied[9] and thus must be tested on its face—is consistent with the Motor Carrier Act and with this Court's decision in *United States* v. *Drum*, *supra*. Because the decision below creates no conflict among the circuits, and because there is ample opportunity for judicial review of concrete applications of the new policy, review by this Court is unwarranted.

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[8] The court of appeals also held (Pet. App. 92a-93a) that the new policy was formulated in compliance with the National Environmental Policy Act, 42 U.S.C. (& Supp. V) 4321 *et seq.*, and the Energy Policy and Conservation Act, 42 U.S.C. (& Supp. V) 6201 *et seq.*

[9] The court of appeals stayed the effectiveness of the new policy pending completion of judicial review.

1. All three petitioners assert that the Commission's new policy is precluded by *Drum*. Petitioners ATA and Ryder (ATA Pet. 15-17; Ryder Pet. 8, 9, 11) maintain that *Drum* required shippers leasing from a single source to make the drivers their employees, and immutably defined the "characteristic burdens" as the financial risks of initial investment, loss, depreciation, idleness of equipment, and variable cost increases. Petitioners NARUC and Ryder additionally contend (NARUC Pet. 8-17; Ryder Pet. 9, 10-11) that the new policy violates the requirement, enunciated in *Drum*, that the Commission adopt a practical distinction between for-hire and private carriage because, in petitioners' view, the new policy is not capable of being enforced. These contentions rest on a patently erroneous interpretation of *Drum*.

a. This Court in *Drum* did not, as petitioners suggest, undertake to define the characteristic burdens of transportation, or require continued use of presumptions that all single source leases give rise to for-hire carriage. To the contrary, as the court of appeals correctly recognized (Pet. App. 76a-78a), the Court in *Drum* articulated only general principles to be applied in single source leasing cases, while leaving to the Commission's judgment the task of determining whether in a particular case those principles had been satisfied.[10] Petitioners can point to nothing in *Drum* that suggests that this Court did anything

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[10] Although ATA strenuously contends that the Court clearly confined the Commission to the "burdens" discussed in *Drum*, it nevertheless concedes that "the Commission must determine" where the line is to be drawn (Pet. i) and that "the Commission is permitted some discretion in framing a workable test that is consistent with the objectives of economic regulation" (Pet. 13 (footnote omitted)).

other than affirm an agency exercise of discretion to give meaning to general statutory definitions. Indeed, had the Court in *Drum* actually done what petitioners claim it did, the Court would have engaged in exactly the same unwarranted intrusion into the administrative domain that prompted the Court to reverse the district court's judgment (368 U.S. at 385-386). In short, the court of appeals was correct when it held (Pet. App. 76a) that this Court's prior affirmance in *Drum* of one Commission approach to defining the characteristic burdens of transportation does not preclude the Commission from subsequently adopting another approach that is consistent with the general principles articulated by the Court.

The Commission's new policy is, on its face, entirely consistent with the principles set forth in *Drum*. As the court of appeals correctly held (Pet. App. 78a-81a), although the Commission has now abandoned the presumptions it created under the 1935 Act, the Commission retains the traditional control and substance tests, as well as its commitment to examine all of the circumstances in a leasing arrangement. There is, accordingly, no basis for petitioners' claim that the new policy radically alters the traditional factors bearing on the line drawing process. The basic test remains the same; all that has been changed by the policy statement is the Commission's previous position that single source leases should be presumed to constitute for-hire carriage. Although those arrangements that comply with the Commission's six minimum criteria will now create a presumption in favor of for-hire carriage, the lease arrangements remain, as always, subject to Commission scrutiny in the context of particular cases.

b. The court of appeals properly rejected (Pet. App. 91a) the claims of petitioners NARUC and Ryder that the states would be unable, in actual cases, to enforce the distinction between the two types of service. NARUC argues (Pet. 10, 11) that the new policy can never work because it would require state enforcement authorities to prove violations of law, instead of requiring truck drivers to prove that they are *not* law breakers. In NARUC's view (Pet. 12-13), if a state officer cannot "determine on the spot" whether a purported private carrier is performing illegal for-hire service, state enforcement will "become no more than guesswork." In NARUC's view, administrative and judicial proceedings can work only if unlawful behavior is presumed.

NARUC's fear that state inspection officers will be unable to perform their function of identifying violations of law under the new policy is unfounded. In large measure, NARUC's fear rests upon its erroneous assumption (Pet. 11-13) that oral single source leases will automatically raise the presumption of legitimate private carriage and insulate drivers from further inquiry. But the Commission, in its policy statement, provided sample lease language (Pet. App. 57a-58a) and stated that the presumption arises *only* if the six minimum criteria are embodied in a lease (*id.* at 57a). Moreover, that presumption can be rebutted by a showing that actual operations do not conform to the lease.[11] Because an owner-operator

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[11] Petitioner Ryder claims (Pet. 9) that the new policy will inevitably blur the statutory distinction because the new policy does not require faithful adherence to the lease terms. Ryder has apparently overlooked both the Commission's specific statements (Pet. App. 34a, 41a) that such adherence is

must show that the criteria are satisfied in order to raise the presumption, and because it would be virtually impossible to make such a showing at a road check without a written lease, it would be entirely reasonable for an enforcement officer to require something more than a mere oral assertion of lawful activity from a driver who fails to produce a written lease.[12] Given the exaggerated nature of NARUC's fears, the court of appeals properly decided that actual enforcement cases would provide a much better arena for determining whether, as the Commission believes, the new policy will work in practice.[13]

2. Petitioners ATA (Pet. 10-13) and Ryder (Pet. 12-15) contend that the decision below conflicts with the Fifth Circuit's decision in *Central Forwarding*,

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in fact required, and the court of appeals' citations to those statements (*id.* at 69a, 73a, 91a).

[12] Indeed, the Commission made it clear that it considers a written lease the best evidence of the circumstance of a lease, and it promised to "subject oral leases to more careful and detailed scrutiny than written leases" (Pet. App. 38a).

[13] NARUC also claims (Pet. 12-13) that the new policy will be unworkable because the Commission would permit multiple oral subleasing which would negate the requirement for exclusive shipper control of the leased equipment. In fact, what the Commission said was that trip leasing (which for-hire carriers routinely use without compromising the exclusive control they must exercise over owner-operators) is not necessarily inconsistent with the exclusive control required by the new policy (Pet. App. 34a-35a). The Commission did not endorse trip leasing that would negate the exclusive control requirement.

In any event, should the Commission actually implement the subleasing policy in a manner that effectively eliminates any distinction between for-hire and private carriage, ample judicial remedies are available.

Inc. v. *ICC*, 698 F.2d 1266 (1983). These contentions are without merit. In *Central Forwarding*, the Fifth Circuit reviewed an ICC rule setting the compensation to be paid to owner-operators by regulated carriers. The issue was whether Congress entrusted regulation of labor compensation levels to the ICC. 698 F.2d at 1273. The court held that no substantive provision of the Interstate Commerce Act conferred such regulatory authority, and that the National Transportation Policy (NTP) could not create regulatory authority in the absence of a substantive statutory provision. Thus, as petitioner ATA correctly states (Pet. 10), *Central Forwarding* establishes that the NTP guides the ICC in carrying out its delegated regulatory powers. 698 F.2d at 1284. See also *Schaffer Transportation Co.* v. *United States*, 355 U.S. 83, 87-88 (1957).

Unlike the Commission determination at issue in *Central Forwarding*, an ICC determination concerning whether a particular leasing arrangement is regulated or exempt plainly implements the Act's substantive definitions of the two kinds of service. Indeed, even petitioners concede that such determinations have always been a proper ICC regulatory function (ATA Pet. i, 13, 16; Ryder Pet. 5; NARUC Pet. i, 15-16). Here, because the court of appeals simply held (Pet. App. 90a) that the NTP supports the Commission's view of how best to carry out its regulatory function, there is no merit to petitioners' claims that the court's decision in this case conflicts with *Central Forwarding*.[14]

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[14] Petitioners' claim of a conflict is further discredited by the recent Fifth Circuit decision in *American Trucking Associations, Inc.* v. *ICC*, 722 F.2d 1243 (1984). There, the court relied in part (*id.* at 1251) on the 1980 amendments to

Petitioners claim (ATA Pet. 12-13; Ryder Pet. 14-15), however, that, in any event, the court of appeals erred when it concluded (Pet. App. 89a-90a) that the new policy would be consistent with the NTP because it would enhance competition and in turn foster a healthier regulated and unregulated transportation industry. Petitioners argue that the new policy contravenes the NTP because it will raise owner-operator compensation and thus raise carrier rates. This argument fails because petitioners overlook the fact that the NTP is not solely concerned with rate levels, but seeks also to maintain a sound transportation industry. See 49 U.S.C. (Supp. V) 10101(a)(7) (C), (D) and (F). Because the financial viability of owner-operators indisputably affects "the health and stability of the trucking industry as a whole" (*Global Van Lines, Inc.* v. *ICC*, 627 F.2d 546, 551 (D.C. Cir. 1980)), the court of appeals was correct in holding that the Commission could reasonably conclude that its new policy is consistent with the NTP, even if, as petitioners urge, the NTP applies only to regulated entities.[15]

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the National Transportation Policy in upholding the Commission's decision to abolish a long-standing policy of requiring a showing of "special circumstances" before a rail affiliated motor carrier could qualify for unrestricted motor carrier operating authority.

[15] In fact, there is no merit to petitioners' claim that the NTP applies only to regulated entities. The Commission is charged with promoting a developed and coordinated transportation system. It is difficult to perceive how the Commission could accomplish that task if it were required, as petitioners suggest, to ignore the effects of its regulatory decisions on other large and important (albeit unregulated) segments of the transportation industry. The courts have consistently en-

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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MARCH 1984

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dorsed the Commission's broader and more reasonable view of the NTP. See, *e.g.*, *Mercury Motor Express, Inc.* v. *United States*, 648 F.2d 315, 319 (5th Cir. 1981).

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No. 83-943

IN THE SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM 1983

AMERICAN TRUCKING ASSOCIATIONS,
INC., ET AL.,
PETITIONERS
v.
UNITED STATES OF AMERICA
and
INTERSTATE COMMERCE COMMISSION,
RESPONDENTS

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

JOINT BRIEF OF RESPONDENTS CHARTER EXPRESS, INC., et al. IN SUPPORT OF PETITION

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QUESTION PRESENTED

Whether the national transportation policy stated in 49 U.S.C. §10101 provides the Interstate Commerce Commission an independent source of authority to improve the financial lot of non-regulated transportation entities, to the detriment of regulated carriers?

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ON PETITION FOR WRIT OF CERTIORARI
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JOINT BRIEF OF RESPONDENTS CHARTER EXPRESS, INC., et al. IN SUPPORT OF PETITION

Come now Charter Express, Inc., Hedrick Associates, Inc., North Alabama Transportation, Inc., Port Norris Express Co., Inc., and Senn Trucking Company, intervenors below and respondents herein

(hereinafter joint respondents)[1] in support of the petition of American Trucking Associations, Inc., et al., for a writ of certiorari to the United States Court of Appeals for the Eleventh Circuit (hereinafter, the petition). Said petition was filed on December 7, 1983.

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1. Parents, subsidiaries and affiliates of joint respondents:

Charter Express, Inc., is affiliated with National Trucking, Inc., and Helen Reagan, d/b/a Southeast Trucking Company.

Hedrick Associates, Inc., has no related companies.

North Alabama Transportation, Inc., is affiliated with DeKalb Transportation, Inc., and D&E Brokers, Inc. The latter will shortly become a wholly-owned subsidiary of North Alabama Transportation, Inc.

Port Norris Express Co., Inc., is affiliated with Garrison & Bradway, Inc.

Senn Trucking Company has only a wholly-owned subsidiary.

OPINIONS BELOW

The opinion of the Interstate Commerce Commission, attached as Appendix A to the petition, is reported at 132 M.C.C. 756 (1982). The opinion of the United States Court of Appeals for the Eleventh Circuit, attached as Appendix B to the petition, is reported at 716 F.2d 1369 (1983). To the extent necessary, joint respondents will refer to the opinions below by citation to pages of Appendices A and B to the petition.

STATUTES

The primary statutory provision involved herein is 49 U.S.C. §10101. Relevant statutory provisions are set forth in Appendix E to the petition. References to that appendix will be made herein as necessary.

STATEMENT OF THE CASE

Joint respondents adopt the statement of the case contained in the petition.

ARGUMENT

1. Decision below will adversely impact on the soundness of the nation's regulated transportation system.

The Eleventh Circuit's decision below upholds the decision of the Interstate Commerce Commission (ICC or Commission) redrawing the boundary between regulated and non-regulated motor carriage. The change in this line of demarcation will hurt the nation's regulated motor carriers. Such a change is of major importance, and warrants this Court's consideration.

The ICC decision below did two things. First, it changed the agency's test for determining if a particular service arrangement is private carriage by doing away with certain long-standing presumptions. But also, and perhaps more importantly, the agency showed its clear intent to in the future classify as private carriage service arrangements which would previously have been held to be regulated carriage.[2] In essence, the Commission's decision opens the door to direct competition between regulated carriers and uncertificated single-source lessors in providing for-hire carriage.

The "control and responsibility" test proffered by the Commission to

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2. See generally: Lease of Equipment and Drivers to Private Carriers, 132 M.C.C. 756, 770 (1982) [page 23a of Appendix A to the petition].

replace the "control and significant assumption of the characteristic burdens of transportation" test puts no significant burden on the lessee. Merely by entering a 30-day lease for so-called exclusive use of a vehicle and driver,[3] choosing where and when its goods will be delivered, and assuring that safety inspections are performed and that liability insurance is in

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3. The Commission's decision explicitly sanctions the lessor's arrangement of coordinated leases which would allow it to serve two shippers who ship in opposite directions. Lease of Equipment and Drivers, 132 M.C.C. at 778, FN. 34, and 780 [pages 34a-35a, and 38a of Appendix E to the petition]. This leaves the lessor with the traditional "control" function of coordinating movements.

force,[4] a shipper can qualify its lease arrangement as private carriage.

In actuality, this standard leaves the lessee with little more responsibility than it would have in its ordinary non-transportation operations. In turn, this gives the lessor virtually complete responsibility for assuming the "characteristic burdens" of transportation service.

This Court has stated that a lessee must assume a significant part of the characteristic burdens of transportation to qualify its lease arrangement as pri-

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4. See generally: Lease of Equipment and Drivers, 132 M.C.C. at 778-779 [pages 34a-35a of Appendix E to petition]. The Commission's guidelines do not provide, however, that the lessee must directly bear the cost of providing insurance, but only that it assure that the operation is insured and that it bear the risk of being under insured.

vate carriage.[5] The Drum decision did not leave the Commission room to reallocate these burdens as it has attempted to do.

Under the Commission's new rules, shipper-lessees will be able to obtain from major leasing companies and approximately 125,000 owner-operators a service which is like that of a regulated motor carrier. However, these new competitors will not have to bear the burdens of regulated operation such as obtaining licenses and publishing rates. Such bur-

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5. See: United States v. Drum, 368 U.S. 370, 375 (1962) ("The Commission has correctly interpreted" the definition of private carriage to include assuming "in significant measure the characteristic burdens of the transportation business." [Emphasis added.] This language implies a fundamental attribute which is inherent in the statute, and is not within the Commission's province to change.)

dens have been affirmed by Congress as essential to a healthy transportation system.

The Commission's new definition of private carriage sets up an unequal competition between regulated carriers and unregulated leasing companies and owner-operators. By being unregulated, the new competitors will have an advantage which will allow a significant diversion of traffic from the regulated industry. This is contrary to the national transportation goal of fostering a healthy, regulated transportation system.

2. National transportation policy does not authorize the ICC to better the lot of unregulated transportation entities at the expense of the regulated industry.

The major change in the trans-

portation industry just described would hurt the nation's regulated carriers. Such a result is contrary to the national transportation policy of 49 U.S.C. §10101. Yet that section was used by the Commission and the court below to justify their decisions.

The national transportation policy states Congressional goals for improving the regulated motor carrier industry.[6] Its provisions pertain to regulating transportation by "motor carrier." Under the statute, "'motor carrier' means a motor common carrier and a motor contract carrier"; i.e., regulated

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6. See: 49 U.S.C. §10101(a)(2) [formerly §10101(a)(7); pages 98a and 99a of Appendix E to the petition].

carriers.[7]

Congress did seek in passing the Motor Carrier Act of 1980 to assist non-regulated transportation entities to some extent. However, its main tool for doing so was to specifically exempt them from Commission regulation.[8] Congress did not intend by revising the statement of the national transportation policy to give the Commission carte blanche to assist the non-regulated industry.

Nevertheless, the ICC relied on 49 U.S.C. §10101(a)(2) to broaden the

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7. 49 U.S.C. §10102(12) [formerly §10102(11); page 99a of Appendix E to the petition].

8. See: Sections 7 and 9 of the Motor Carrier Act of 1980, Pub. L. 96-296, 94 Stat. 793 (1980) [pages 102a to 104a of Appendix E to the petition].

definition of private carriage in order to improve the lot of non-regulated entities such as private carriers and commercial lessors.[9] This reliance was completely wrong because the action taken hurts the regulated industry.

Also, reliance on the national transportation policy was essentially the only basis for the court's holding below. After rejecting the Commission's reliance on Sections 5, 7 and 9 of the Motor Carrier Act of 1980 to support its action, the court concluded:

> . . .that the Commission's assertion of changes in the industry, as supported by the National Transportation Policy, provides a rational basis for reconsidering and rejecting the presumptions announced in Church and Oklahoma Furni-

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9. See: Lease of Equipment and Drivers, 132 M.C.C. at 775, FN. 30 [page 30a of Appendix A to the petition].

ture.[10]

The court should not have upheld the Commission's action on the basis of the national transportation policy. That section is a guideline only. It is intended to be implemented only by the specific directives set forth elsewhere in the statute.[11]

The national transportation policy cannot serve as the sole authority for a

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10. Ryder Truck Lines, Inc. v. United States of America and Interstate Commerce Commission, 716 F.2d 1369, 1386 (11th Cir. 1983) [page 90a of Appendix B to the petition].

11. See: 49 U.S.C. §10101(b) [page 99a of Appendix E of the petition]; Cf: 49 U.S.C. §10922(b)(2) ("In making a finding under [the common carrier licensing standards] the Commission shall consider, and to the extent applicable, make findings on at least the following: (A) the transportation policy of section 10101(a) of this title; . . .) [page 101a of Appendix E to the petition].

Commission action.[12] In upholding the Commission's action on that basis, the court below erred.

CONCLUSION

The issue determined below is of exceptional importance to the existence and health of a regulated national transportation system. As such, that issue requires this Court's attention.

The court below relied on the national transportation policy as authority for the action taken by the Commission. That reliance abuses the intent of the national transportation policy by turning it against the regulated industry and by treating it as conferring on the Commission independent authority to act.

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12. See: Central Forwarding, Inc. v. Interstate Commerce Commission, 698 F.2d 1266 (5th Cir. 1983).

This misuse of the national transportation policy requires correction by this Court, particularly in light of the conflict between the decision below and Central Forwarding v. Interstate Commerce Commission, supra.

WHEREFORE, joint respondents pray that this Court grant petitioners' request for issuance of a writ of certiorari to the United States Court of Appeals for the Eleventh Circuit on its decision below.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

No. 83-943

AMERICAN TRUCKING ASSOCIATIONS, INC., *et al.*,
Petitioners,

v.

UNITED STATES OF AMERICA and
INTERSTATE COMMERCE COMMISSION,
Respondents.

No. 83-1030

RYDER TRUCK LINES, INC.,
Petitioner,

v.

UNITED STATES OF AMERICA and
INTERSTATE COMMERCE COMMISSION,
Respondents.

No. 83-1119

NATIONAL ASSOCIATION OF REGULATORY
UTILITY COMMISSIONERS,
Petitioners,

v.

UNITED STATES OF AMERICA and
INTERSTATE COMMERCE COMMISSION,
Respondents.

BRIEF IN OPPOSITION TO PETITIONS FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the decision of the Eleventh Circuit affirming the Commission's policy statement in MC-122 (Sub-No. 2) is inconsistent with the Motor Carrier Act, 49 U.S.C. §§10101, *et seq.*?

2. Whether the decision of the Eleventh Circuit conflicts with the decision of this Court in *United States v. Drum*, 368 U.S. 370 (1962)?

3. Whether the decision of the Eleventh Circuit conflicts with the decision of the Fifth Circuit in *Central Forwarding, Inc. v. ICC*, 698 F.2d 1266 (5th Cir. 1983)?

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

No. 83-943

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No. 83-1119

NATIONAL ASSOCIATION OF REGULATORY
UTILITY COMMISSIONERS,
Petitioners,

v.

UNITED STATES OF AMERICA and
INTERSTATE COMMERCE COMMISSION,
Respondents.

BRIEF IN OPPOSITION TO PETITIONS FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Intervenor-respondent The National Industrial Transportation League (League)[1] respectfully submits this Brief in Opposi-

[1]Pleadings on behalf of the League in the proceedings below were submitted under the name of The National Industrial Traffic League. In November, 1982, the organization changed its name to The National Industrial Transportation League.

tion to the Petitions for Writ of Certiorari filed by Petitioners American Trucking Associations, Inc. *et al.*, (ATA), Ryder/PIE Nationwide, Inc. (Ryder), and the National Association of Regulatory Utility Commissioners (NARUC) in the above-named cases. Because the issues and arguments presented in these Petitions are subtantially similar, the League has consolidated its responses to the three Petitions in this Opposition Brief.

The National Industrial Transportation League is a voluntary organization of shippers, groups and associations of shippers, and other representatives of industrial and commercial enterprises located throughout the United States. It was a participant in the proceedings before the Interstate Commerce Commission (Commission) and an intervenor-respondent in support of the decision of the Commission before the United States Court of Appeals for the Eleventh Circuit. The League accepts the citations to the opinion below, statements of jurisdiction, and citations to the relevant statutory provisions offered by the petitioners. The League's Statement of the Case and its Reasons for denying the Petitions for Writ of Certiorari are set forth below.

STATEMENT OF THE CASE

After notice and comment, the Interstate Commerce Commission (Commission) on February 17, 1982 served its policy statement in Ex Parte No. MC-122 (Sub-No. 2), *Lease of Equipment and Drivers to Private Carriers,* 132 M.C.C. 756 (1982); ATA Appendix A.[2] The Commission's decision set forth a set of guidelines which modified the existing Commission policy with regard to single-source leasing.[3]

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[2]All appendix references are to the appendices included in the Petition for Writ of Certiorari of American Trucking Associations, Inc., *et al.*, No.83-943.

[3]Under a single-source leasing arrangement, a lessee obtains both vehicle and driver from a single lessor source.

Previously, the Commission employed the so-called "control and substance" test in order to distinguish private carriers from for-hire carriers in single-source leasing contexts. In *H.B. Church Truck Service Company, Common Carrier Application,* 27 M.C.C. 191 (1940), the Commission stated that a rebuttable presumption of for-hire carriage would attach to a single-source leasing arrangement, a presumption that would yield to evidence that the shipper exercised exclusive direction and control over the transportation service. *Oklahoma Furniture Manufacturing Company - Investigation, Operations,* 79 M.C.C. 403, 409-10 (1959), supplemented *Church's* presumptive "control" test with a fact-based inquiry into whether the financial arrangements between the shipper-lessee and the lessor "in substance" constituted for-hire carriage. In *United States v. Drum,* 368 U.S. 370 (1962), the Supreme Court affirmed that the two-pronged "control and substance" test of *Oklahoma Furniture* was a reasonable exercise of the Commission's authority.

The MC-122 (Sub-No. 2) decision eliminated the "control presumption" of *Church* and *Oklahoma Furniture* and promulgated a list of factors which the Commission proposed to rely upon in distinguishing private from for-hire carriage in single-source leasing. The Commission emphasized that these criteria were non-exhaustive and would be applied in the course of rigorous investigations into the actual conduct of operations under single-source leases. 132 M.C.C. at 776; ATA Appendix A at 31a.

Petitions for review of the MC-122 (Sub-No. 2) decision were filed in the Eleventh Circuit in No. 82-5247, *Ryder Truck Lines, Inc. v. United States and ICC,* and No. 82-8133, *Bowman Transportation, Inc. v. United States and ICC,* which were then consoldiated for review. By order filed March 25, 1982, the Eleventh Circuit granted a stay *pendente lite* of the Commission's decision. On October 11, 1983 the Court of Appeals issued its decision in the consolidated cases, holding that the Commission's policy statement was within its statutory au-

thority and had a rational basis. *Ryder Truck Lines, Inc. v. United States,* 716 F.2d 1369 (11th Cir. 1983); ATA Appendix B at 59a.

On November 17, 1983 the Eleventh Circuit stayed the issuance of its mandate pending the filing of a petition for writ of certiorari until December 5, 1983, the stay to continue in effect until final disposition by this Court. A further stay of the issuance of the mandate until December 7, 1983 was granted on December 1, 1983. Petitioner American Trucking Associations, Inc., *et al.* filed on December 7, 1983 a Petition for Writ of Certiorari, Case No. 83-943; this was followed by additional, separate petitions filed on behalf of Ryder Truck Lines, Inc., Case No. 83-1030, and the National Association of Regulatory Utility Commissioners, Case No. 83-1119. The Court of Appeals on January 27, 1984 denied the motion of the Interstate Commerce Commission to vacate the stay of the mandate.

REASONS FOR DENYING THE WRIT

The petitioners argue that the decision of the Eleventh Circuit is inconsistent with the provisions of the Motor Carrier Act, 49 U.S.C. §§10101, *et seq.* (MCA) (ATA Petition at 5-13; Ryder Petition at 15-18); that the decision is contrary to this Court's decision in *United States v. Drum,* 368 U.S. 370 (1962) (ATA Petition at 13-17; Ryder Petition at 8-12; NARUC Petition at 13-17); and that the Eleventh Circuit's holding conflicts with the Fifth Circuit's decision in *Central Forwarding, Inc. v. ICC,* 698 F.2d 1266 (5th Cir. 1983) (ATA Petition at 10-13; Ryder Petition at 14-15).

The petitioners' arguments are incorrect. The decision of the Eleventh Circuit is fully in accord with the statutory framework of the Motor Carrier Act, and is not inconsistent with this Court's precedent or the decisions of other courts of appeals.

A. The Decision of The Eleventh Circuit Affirming the Commission's Decision is Consistent With the Provisions of the Motor Carrier Act

The petitioners assert that the Eleventh Circuit's decision defeats the provisions and purposes of the Motor Carrier Act by undermining the distinctions between private and for-hire motor carriage. They argue that because Congress did not amend in 1980 the existing statutory definitions of "motor carrier," "motor common carrier," "motor contract carrier," and "motor private carrier,"[4] and did not explicitly overrule the Commission's for-hire presumption, the Commission is thus locked into the single-source leasing policy it set forth in *Church* and *Oklahoma Furniture* (ATA Petition at 8-9; Ryder Petition at 16-18).

This contention is flawed on several counts. First, as the Court of Appeals noted in its decision, there is no evidence of Congressional comment regarding the Commission's single-source leasing policy in the legislative record of the Motor Carrier Act of 1980, nor any indication that Congress considered and rejected proposals to abolish the for-hire presumption. 716 F.2d at 1378, 1385 n. 20: ATA Appendix B at 75a, 88a. Indeed, the Court's decision pointed to language in the Senate Report accompanying the 1980 Act that expressly identified the Commission as the appropriate forum for addressing issues not dealt with by Congress. 716 F.2d at 1385 n. 20; ATA Appendix B at 88a. In addition, the Eleventh Circuit properly looked to Congress' overall diminished concern with protectionism and its enhanced reliance on competition, as embodied in the Motor Carrier Act of 1980. 716 F.2d at 1386; ATA Appendix B at 90a.

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[4]The Motor Carrier Act of 1980, P.L. No.96-296, 94 Stat. 793 (1980) did make certain changes in the definition of "motor contract carrier" contained in 40 U.S.C. §10102(12) which permitted a contract carrier to serve a larger number of shippers and operate simultaneously as a contract and common carrier. P.L. No. 96-296, §10, 94 Stat. 793, 799 (1980).

These circumstances alone justify the lower Court's determination that the Commission's decision is consistent with the statutory scheme.

The petitioners' arguments would also deny the Commission its prerogative and its duty, clearly established by the decisions of this Court, to re-examine and modify its policies in response to changing circumstances.[5] The Court of Appeals adhered to long-settled judicial precedent in refusing to impute to Congress' 1980 re-enactment of the MCA's original statutory definitions a legislative mandate for administrative inflexibility.

The petitioners also contend that the Eleventh Circuit's affirmance of the Commission's decision "undermines the essence of the system of economic regulation of for-hire carriage contemplated by Congress" by sanctioning "unregulated and secretive leasing arrangements" (ATA Petition at 5-6). This, however, is mere speculation on the part of the petitioners which merits no weight in an assessment of the validity of the Commission's decision or a review of the soundness of the lower Court's judgment. As the Court noted, the Commission emphasized that it plans to preserve the distinction between private and for-hire carriage. 716 F.2d at 1386; ATA Appendix B at 91a. Indeed, the Commission's revised policy, which calls for a detailed, multifactor examination of transportation circumstances, should be viewed not as a vehicle for destroying the concept of regulated carriage, but as a means to provide more refined and accurate determinations in individual leasing contexts.

To the extent that the petitioners contend that the Commission will apply its new guidelines in a manner that will destroy the statutory distinction between private and for-hire carriage, this issue is not ripe for judicial review by this Court. The policy

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[5] *See, e.g., American Trucking Associations v. Atchison, Topeka and Santa Fe Railway Co.*, 387 U.S. 397, 416 (1967); *Massey Motors, Inc. v. United States*, 364 U.S. 92 (1960).

statement provides a set of flexible principles to guide future agency decisionmaking; the exact parameters of the revised policy will emerge only over the course of individual enforcement proceedings. For this reason,

> " . . . judicial appraisal of these factors is likely to stand on much surer footing in the context of specific application of this regulation than could be the case in the framework of the generalized challenge made here."

Toilet Goods Association, Inc. v. Gardner, 387 U.S. 158, 164 (1967).

B. The Decision of The Eleventh Circuit Is Consistent With This Court's Decision in United States v. Drum

The petitioners err in asserting that the Court of Appeal's decision conflicts with this Court's decision in *United States v. Drum*, 368 U.S. 370 (1962). Although *Drum* did affirm the Commission's decision in *Oklahoma Furniture*, which employed the "control" presumption of for-hire carriage, at no point does the Supreme Court's opinion indicate that the *Oklahoma Furniture* criteria were the *only* ones consistent with statutory definitions. *Drum* held that the Commission's decision "*does not seem to us to violate* the coherence of the body of administrative and judicial precedents," 368 U.S. at 376 (emphasis added), and "*betokens no heedless departure* from the beaten track of administrative decision . . ." *Id.* at 384 (emphasis added). This is language meant simply to affirm, not enshrine as a matter of law, the presumptive "control and substance" test.

According to the *Drum* court, the Motor Carrier Act required a finding of for-hire carriage in a single-source leasing situation where the shipper did not "assume the characteristic burdens of the transportation business." *Id.* at 375. The decision noted that the Commission had chosen to employ "a developing technique of analysis" in defining the characteristic burdens, thus acknowledging agency discretion in policymaking. *Id.* at 410.

The petitioners appear to have overlooked the facts that *Church* itself represented a departure from prior agency policy, and that *Oklahoma Furniture* in turn modified the *Church* criteria by supplementing the "control" test with the "substance" test. Therefore, the Court of Appeals was justified in concluding that the rejection of the for-hire presumption "is indicative only of the Commission's new views as to which burdens constitute significant indicia of private transportation." 716 F.2d at 1380; ATA Appendix B at 78a. The precedent of *Drum* cannot be invoked to obstruct the evolutionary course of policy development.

C. The Decision of The Eleventh Circuit Does Not Conflict With the Decision of The Fifth Circuit in Central Forwarding, Inc. v. ICC

According to the petitioners, both the Commission and the Court of Appeals have attempted to use the National Transportation Policy (NTP) as an independent source of authority for the revised single-source leasing policy. Such reliance on the NTP, they argue, was denied by the Fifth Circuit in *Central Forwarding, Inc. v. ICC*, 698 F.2d 1266 (5th Cir. 1983). However, this case and *Central Fowarding* are readily distinguishable. At issue in *Central Forwarding* was the Commission's authority to issue rules concerning the level of compensation paid by regulated carriers to unregulated owner-operators; the Fifth Circuit held that the NTP *alone* could not authorize such a regulation in the absence of another, substantive empowering provision of the Interstate Commerce Act. By contrast, the Commission unquestionably has the authority to make decisions defining the boundary between private and for-hire carriage in the leasing context. *Drum* expressly affirms this authority.[6] Thus, the Commission also has the authority to issue policy statements which outline the considerations that will

[6] ". . . The Commission, therefore, has had to decide whether a particular arrangement gives rise to that 'for-hire' carriage which is subject to economic regulation in the public interest, or whether it is, in fact, private carriage. . ." 368 U.S. at 374.

guide the agency's decisionmaking in future enforcement proceedings.

The Commission identified the NTP as one basis for the reasonableness of the particular policy choice adopted pursuant to agency authority to enforce the Motor Carrier Act. As the Court of Appeals noted, there were additional reasonable justifications for the Commission's policy change, perhaps most important the reduced need for protectionist regulation in the face of a changing transportation environment. In this regard, the Eleventh Circuit's decision is in accord with the Fifth Circuit's decision in *Mercury Motor Express, Inc. v. United States*, 648 F.2d 315 (5th Cir. 1981), which upheld a Commission change in policy direction based upon "[t]he dramatic changes which have taken place within the area of its ongoing regulation [that] have persuaded the Commission that its former protectionist attitude toward the financial stability of the regulated carriers is no longer consistent with the national interest." 648 F.2d at 319.

CONCLUSION

For the foregoing reasons, the Petitions for Writ of Certiorari should be denied.

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NOS. 83-943, 83-1030 and 83-1119

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NATIONAL ASSOCIATION OF
REGULATORY UTILITY COMMISSIONERS,
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UNITED STATES OF AMERICA and
INTERSTATE COMMERCE COMMISSION,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

CONSOLIDATED BRIEF IN OPPOSITION FOR RESPONDENTS THE PRIVATE CARRIER CONFERENCE, INC. AND THE NATIONAL-AMERICAN WHOLESALE GROCERS' ASSOCIATION

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February 6, 1984

COUNTERSTATEMENT OF THE QUESTIONS PRESENTED

Since the passage of the Motor Carrier Act of 1935, the Interstate Commerce Commission periodically has been called upon to decide cases and establish rules and policy construing the parameters of private carriage exempt from the Commission's economic jurisdiction. In the instant case, the ICC has announced a new policy for determining whether a particular transportation leasing arrangement constitutes private carriage. Three Petitions for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit have been filed challenging the Commission's policy statement. In the interest of judicial efficiency, Respondents requested and were granted authority to file a consolidated response to the Petitions for Writ of Certiorari. Respondents pose the following questions which adequately cover the questions presented by Petitioners:

1. Whether the Eleventh Circuit, in exercising its function of judicial review, appropriately upheld the Commission's new policy statement as a permissible and rational exercise of the Commission's regulatory authority and responsibility?

2. Whether there is, in fact, a real conflict between the Court of Appeals for the Fifth and Eleventh Circuits concerning the permissible scope of the National Transportation Policy?

3. Whether the Commission's new policy statement is consistent with this Court's decision in *United States* v. *Drum* which acknowledged the evolving nature of the test utilized by the Commission to distinguish private from for-hire carriage?

THE PARTIES

Respondents adopt the list of parties set forth in the Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit filed by the American Trucking Associations, Inc., No. 83-943 (hereinafter referred to as "ATA's Pet. App."). To that List, Respondents would add the following descriptive information.

IDENTIFICATION OF THE PRIVATE CARRIER CONFERENCE, INC.

The Private Carrier Conference, Inc. ("PCC" or "the Conference") is a national, non-profit trade association with a membership of more than 4,000 manufacturers, distributors, processors and retailers who operate motor trucks incidental to and within the scope of their non-transportation primary business endeavors. Also included in PCC's membership are other national trade associations, truck equipment and component manufacturers, vehicle and driver leasing companies and other business firms supporting private carriage. PCC is an independent, separately chartered organization affiliated with the American Trucking Associations, Inc. PCC speaks for private motor carriers on all issues of concern.

IDENTIFICATION OF THE NATIONAL-AMERICAN WHOLESALE GROCERS' ASSOCIATION

The National-American Wholesale Grocers' Association (NAWGA) is a national trade association representing nearly 400 independent wholesale grocers and food service distributors. These companies, both large and small, supply grocery products and provide a wide array of services to retail grocery stores, hospitals, schools, restaurants and other food service establishments throughout the United States. Marketing products from over 800 separate distribution centers, NAWGA member companies account for nearly $50 billion of the nation's grocery product volume and one-third of the groceries distributed nationally. NAWGA's food service division, the International Food Service Distributors' Association, represents

member firms who sell annually over $10 billion in food and related products to the institutional, away-from-home food service market. NAWGA's member firms maintain extensive private carriage fleets to transport goods in furtherance of their non-transportation primary business endeavors. They implement such private carriage via reliance upon directly employed and/or leased drivers.

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ADMINISTRATIVE DECISIONS

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NOS. 83-943, 83-1030 and 83-1119

IN THE

Supreme Court of the United States

October Term, 1983

AMERICAN TRUCKING ASSOCIATIONS, INC., *et al.*,
Petitioners,

v.

UNITED STATES OF AMERICA and
INTERSTATE COMMERCE COMMISSION,
Respondents.

RYDER TRUCK LINES, INC.,
Petitioner,

v.

UNITED STATES OF AMERICA and
INTERSTATE COMMERCE COMMISSION,
Respondents.

NATIONAL ASSOCIATION OF
REGULATORY UTILITY COMMISSIONERS,
Petitioner,

v.

UNITED STATES OF AMERICA and
INTERSTATE COMMERCE COMMISSION
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

CONSOLIDATED BRIEF IN OPPOSITION FOR RESPONDENTS THE PRIVATE CARRIER CONFERENCE, INC. AND THE NATIONAL-AMERICAN WHOLESALE GROCERS' ASSOCIATION

The Private Carrier Conference, Inc. ("PCC") and the National-American Wholesale Grocers' Association ("NAWGA") (hereinafter referred to as "Respondents") respectfully submit this Consolidated Brief in Opposition to the Petitions for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit to review that Court's decision in *Ryder Truck Lines, Inc.* v. *United States*, 716 F.2d 1369 (1983). The Eleventh Circuit upheld the ICC's establishment of a new policy

for determining whether a particular transportation leasing arrangement constitutes for-hire or private carriage. This "Consolidated Brief in Opposition to Petitions for Writ of Certiorari" is submitted pursuant to Rule 22 of the Supreme Court's Rules.[1]

COUNTERSTATEMENT OF THE CASE

The matter currently before this Court stems from a consolidation, by the Eleventh Circuit, of two Petitions for Review of the Interstate Commerce Commission's decision in Ex Parte No. MC-122 (Sub. No. 2), *Lease of Equipment and Drivers to Private Carriers*, 132 M.C.C. 756 (1982) (hereinafter referred to as "*Single-Source Leasing*").

The Motor Carrier Act of 1935, as amended, recognizes the right of shippers to transport their own goods in bona fide private carriage.[2] In numerous cases, however, the Commission has been called upon to determine the factors giving rise to the demarcation between private carriage and for-hire carriage. When a shipper owns equipment and relies upon its own driver employees for the transportation of its goods pursuant to and in furtherance of its primary non-transportation business, the movement accomplished is bona fide private carriage exempt from the Commission's economic regulation.

While a shipper's lease of a driver and vehicle from this same source or from separate, unrelated sources will give rise to a presumption that the shipper has purchased a for-hire carriage service, the presumption is rebuttable. It will be overcome by demonstrating that the shipper has maintained and exerted exclusive dominion and control over the use of both instrumentalities of carriage, *i.e.*, vehicle and driver. *Personnel*

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[1] All parties seeking Supreme Court review in the instant proceedings shall hereinafter be collectively referred to as "Petitioners."

[2] Private carriage is defined as transportation of one's own goods within the scope of and in furtherance of one's primary business, other than transportation. 49 U.S.C. § 10524(a). The private carrier is exempt from economic regulation. Conversely, for-hire (regulated) motor carriers are "motor common carriers," 49 U.S.C. § 10102 (13), and/or "motor contract carriers," 49 U.S.C. § 10102 (14).

Service, Inc.–Investigation of Operations and Practices, 110 M.C.C. 695 (1969), *aff'd, National Motor Freight Traffic Association* v. *United States*, Civil No. 339-71 (D.D.C. June 27, 1972), *aff'd by order*, 409 U.S. 1094 (1973).

Indeed, in *Personnel Service*, a decision admittedly involving separate-source leasing, the drivers in question remained on the payroll of the lessor. Notwithstanding that fact, the Commission was satisfied that sufficient control over the drivers vested in the lessee to sustain a finding of private carriage. Hence, if the facts arising in a single-source context were fully analogous to those in *Personnel Service*, there would be no reason for reaching a distinguishable result.

The standard for assessing the impact of vehicle and driver leases on a lessee's claim to private carrier status had evolved in *United States* v. *Drum*, 368 U.S. 370 (1962).[3] Therein, this Court noted that the Commission had moved away from the control test as the sole criterion for measuring the lawfulness of an alleged private carriage operation. Rather, the Commission had supplemented its control standard with a test of substance.[4] Control was merely one of the responsibilities which private carriers were expected to undertake. Other responsibilities included assumption of liability to the public, bearing the risk of profit or loss on the transportation operation, and commitment of finances to the transportation venture.

Drum and subsequent judicial and administrative decisions continued to recognize the need for the Commission's

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[3] The decision in *United States* v. *Drum*, 368 U.S. 370 (1962), affirmed the ICC's decision in *Oklahoma Furniture Mfg. Co.–Investigation of Operations*, 79 M.C.C. 403 (1959).

[4] The courts have commonly articulated their plotting of the boundary between private and for-hire carriage in leased equipment cases in terms of overall substance, rather than simply in terms of "control." *See Georgia Truck System, Inc.* v. *ICC*, 123 F.2d 210, 212 (5th Cir. 1941) ("[A]ppellant, in substance and in reality, operates a transportation business."); *A. W. Stickle & Co.* v. *ICC*, 128 F.2d 155, 161 (10th Cir. 1942), *cert. denied*, 317 U.S. 650 (test of "substance and reality"); *Lamb* v. *ICC*, 259 F.2d 358, 360 (10th Cir. 1958) ("Simply stated [the issue] . . . is who was transporting the goods in question."); *B&C Truck Leasing, Inc.* v. *ICC*, 283 F.2d 163, 165 (10th Cir. 1960) (test of "substance and effect").

flexibility in the face of changing circumstances. For example, in *Agricultural Transportation Association of Texas* v. *King*, 349 F.2d 873, 883 (5th Cir. 1965), the Fifth Circuit noted:

> . . . *Drum* makes two . . . things clear. The first is that *the test* fashioned continuously by the authoritative policy making agency, the ICC, *is an evolving one* (Emphasis added).

Significantly, the judicially-approved ICC policies did not negate the possibility of private carrier utilization of owner-operators or other single-source lessors.[5]

In the instant case, the Commission, ever cognizant of recent changes in regulatory policy and statutory direction, reassessed its approach to delineating between private and for-hire carriage. After reviewing approximately 155 comments filed in response to its proposed policy statement, the Commission noted:

> In making individual determinations, *we will focus on the elements of control, responsibility, and performance of the key organizing and management functions* of a transportation company as the critical elements in evaluating the character of the service provided. We will, however, no longer employ the rebuttable presumption announced in *H.B. Church Truck Service Co. Com. Car. Application*, 27 M.C.C. 191 (1940),

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[5] To overcome the presumption of for-hire carriage raised by single-source leasing, shippers generally perceived the need to: (1) place owner-operators on their payrolls; (2) undertake the risk of loss of non-utilization of equipment and drivers; (3) reimburse owner-operators for expenses such as tolls and fuel taxes; and (4) maintain strict control over the vehicles, drivers and overall carriage performed. *See Ontario Company-Declaratory Order*, 112 M.C.C. 211 (1970), and *Rayette, Inc.–Investigation of Operations*, 108 M.C.C. 410, 416 (1969). While the ICC's view continued to evolve, many who desired to accomplish private carriage were still dissuaded from utilizing owner-operators and other single-source lessors because of the severe burden of proof and related structural and operational limitations.

> *infra*, that leases of equipment with drivers to shippers ordinarily give rise to for-hire transportation by the lessor[6] (Emphasis added).

Single-Source Leasing recast the essence of private carriage by defining control and substantive burdens in terms of the *assumption of responsibility to the public.*[7] Significantly, the obligations which a private carrier will be expected to assume when it leases vehicles and drivers from a single source now will be akin to the responsibilities assumed by regulated carriers who historically have engaged in single-source leasing under the lease and interchange regulations contained in 49 C.F.R. § 1057. Section 1057.12(d)(1) provides in relevant part that "the authorized carrier lessee shall assume *complete responsibility* for the operation of the equipment for the duration of the lease." (Emphasis added). In *Single-Source Leasing*, the Commission has now established:

> When a private carrier furnishes service in vehicles owned and operated by others, it must control the service to the same extent as if it owned the vehicles, but need control the vehicles only to the extent necessary to be responsible to

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[6] *See* Ex Parte No. MC-122 (Sub. No. 2), *Lease of Equipment and Drivers to Private Carriers*, 132 M.C.C. 756, 758 (1982); ATA's Pet. App., Appendix A at 4a.

[7] The Commission will now presume that private carriage exists in the context of a single-source leasing arrangement where the lessee-shipper is capable of demonstrating:

(1) that the lessor has committed the equipment to the lessee's exclusive use for the term of the lease;

(2) that the lessee assumes exclusive dominion and control over the service;

(3) that the lessee maintains public liability insurance and assumes full liability to the public for injuries caused in the performance of private carriage;

(4) that the lessee assumes responsibility for compliance with safety regulations;

(5) that the lessee, with the exception of negligence on the part of the lessor, bears the responsibility for cargo liability; and

(6) that the term of the lease is at least thirty (30) days.

the public and the Department of Transportation. 132 M.C.C. at 777.

The ICC now discounts to a substantial degree the need for the stringently protectionist policies which it had previously administered in the regulated sector's favor. Therefore, the ICC believes it is justified in removing the onus of discrimination from the shoulders of private carriers[8] who seek to avail themselves of transportation factor inputs, *i.e.*, drivers and vehicles, furnished by single-source lessors.

In *Ryder Truck Lines*, the Eleventh Circuit upheld the Commission's policy statement in *Single-Source Leasing* as a rational and permissible exercise of the Commission's regulatory authority. Upon failing to obtain the desired relief from the Eleventh Circuit, Petitioners now seek to have this Court substitute its judgment for that of the ICC and the Eleventh Circuit.

REASONS FOR DENIAL OF THE WRITS

A. THE COURT BELOW FULLY CONSIDERED AND CORRECTLY DECIDED THE ISSUES

A substantial portion of Petitioners' arguments raised in support of granting certiorari merely amount to a general disagreement with the Eleventh Circuit's affirmance of the ICC policy statement. Petitioners apparently believe that the Supreme Court is simply a tribunal of errors and appeals, a belief clearly contrary to this Court's constitutional mission. For example, Petitioners in Case No. 83-943 ("ATA") contend that the case is of "exceptional national importance." Their arguments, however, are more appropriately reserved for a brief on

[8] The ICC recognized that interstate private carriers outnumber their regulated counterparts by a ratio of better than 9 to 1. The Commission further acknowledged that private carriers are responsible for transporting approximately 40 percent of the freight hauled interstate. *See* "Issues in Regulating Interstate Motor Carriers," published by U.S. General Accounting Office (June 20, 1978) at 13.

the merits. Notwithstanding, the arguments are premised on speculative and exaggerated fears that *Single-Source Leasing* will, necessarily, adversely impact regulated carriers. Specifically, ATA maintains that "the agency record contains substantial evidence of freight diversion from regulated motor carriers to single-source leasing arrangements." ATA's Pet. App. Case No. 83-943, at 5 n. 3. However, Petitioners' diversion of traffic argument ignores recent Congressional and Commission initiatives designed to increase competition in the motor carrier industry. One pertinent example is Section 10922(b) (2) (B), 49 U.S.C. § 10922(b) (2) (B), which prohibits the Commission from denying applicants authority on the grounds that such applicants, if successful, would divert revenues from existing carriers.

More importantly, the diversion argument disregards the dynamics of single-source leasing and existing marketplace realities. Given the liberalized market entry procedures established by the ICC, new carriers are proliferating in the market and thereby increasing competition consistent with the public interest, notwithstanding the fact that some diversion of revenues from existing carriers is occurring.[9]

Congress has concurred in the need for productivity and efficiency through competition in all sectors of the surface transportation industry, *regulated and unregulated* alike, regardless of any potential diversion of traffic from regulated carriers. This is confirmed by Section 9 of the Motor Carrier Act of

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[9] Viewed in its proper perspective, the decision announced in *Single-Source Leasing* is a logical and totally predictable extension of the regulatory reform initiatives which have been implemented by the Commission, the courts and Congress over the past five years. The genesis of such revised regulatory priorities may be found in *Toto Purchasing and Supply Company, Inc. Common Carrier Application*, 128 M.C.C. 873 (1978), *aff'd, Mercury Motor Express, Inc.* v. *United States*, 648 F.2d 315 (5th Cir. 1981). Therein, the Fifth Circuit upheld the ICC's conclusion that elimination by private carriers of empty return (backhaul) movements and resulting stimulation of productivity and fuel-efficiency were more important to the public interest than rigid protection against competition and possible diversion of traffic. The *Toto* decision allowed shippers to supplement their existing private carrier operations with incidental for-hire regulated authority.

1980, 49 U.S.C. § 10524(b) and (c), which exempts from ICC regulation Compensated Intercorporate Hauling ("CIH").[10]

Under its claim of "exceptional national importance," ATA has advanced numerous arguments which should be summarily dismissed for three reasons. First, ATA has either misstated the facts[11] or made a quantum jump from existing facts[12] to an illogical conclusion.[13] Second, the Commission

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[10] H.R. Rep. No. 1069, 96th Cong., 2d Sess. 21-22, *reprinted in* 1980 U.S. Code Cong. & Ad. News 2283, 2303-04. CIH is interstate motor transportation conducted between and among a parent and its wholly-owned subsidiaries. Congress anticipated that private carriers could minimize operational inefficiency by performing transportation services on behalf of shippers within their respective corporate families.

[11] Petitioners in No. 83-943 assert that "under the Eleventh Circuit's decision, a shipper's transportation subsidiary, which is less than 100 percent affiliated with its parent or sister companies, can engage in [CIH] simply by utilizing the device of a single-source leasing arrangement." According to Petitioners, the private carrier could now accomplish indirectly what it could not do directly. ATA's Pet. App., Case No. 83-943 at 8. This statement graphically demonstrates Petitioners' serious misreading of *Single-Source Leasing*. When a less than wholly-owned trucking subsidiary leases drivers and equipment to the parent under a valid single-source leasing arrangement, the concept of CIH never arises. Rather, the trucking subsidiary is acting as a lessor of factor inputs, *i.e.*, drivers and vehicles, and not as a carrier. Moreover, the shipper/parent company is engaging in private carriage; that is, it is taking on much more responsibility than that normally borne by a mere shipper in that it is assuming control over and responsibility for the performance of the transportation operation.

[12] Petitioners also assert that there will be a mass exodus of owner-operators from the regulated to private carrier sector. This assumption is grossly incorrect. Rather, the increased flexibility and new sources of revenue which the decision in *Single-Source Leasing* offers owner-operators will encourage the establishment of new owner-operators. Because the universe of owner-operators will expand, it would be totally inaccurate to suggest that every potential decision by an owner-operator to contract with a private carrier will result in a corresponding loss of access by a regulated carrier to the owner-operator's resources.

[13] An equally meritless claim advanced by Petitioners is that single-source leasing encourages regulated carriers to voluntarily seek revocation of their operating authority and thereafter function as single-source lessors. This claim assumes that regulated carriers and single-source lessors are

and the Eleventh Circuit have reviewed these allegations in detail, have rejected the same and have provided a sound basis for their conclusions. Third, review of Petitioners' speculative arguments would inappropriately transform this Court into a tribunal of errors and appeals.

Petitioners in Case No. 83-943 and Petitioner in Case No. 83-1119 ("NARUC") seem to share the same problem, namely, how to demonstrate exceptional national importance without resorting to factually incorrect statements, or egregious jumps in logic. NARUC contends that the new criteria will create an enforcement nightmare for the forty-one participating states. It maintains that since the Commission does not require a written lease, state officials at various road check points cannot make the necessary on the spot determinations as to whether one is performing legitimate private carriage or purchasing unlicensed for-hire transportation service. NARUC simply ignores the obvious. Should they entertain any doubts as to the bona fides of a trucking operation, state officials at various check points may cite the driver in question for a violation and compel him to demonstrate at a later hearing proof of the legitimacy of the operation. Notwithstanding, NARUC argues that the state's inability to make this instant determination warrants Supreme Court review. Case No. 83-1119, NARUC's Pet. App. at 8-13.

NARUC attempts to create the impression that private carrier single-source leasing under the new policy test creates a new or different enforcement problem for the states. Significantly, the Commission has never required a written lease when a private carrier leased a vehicle from one source and a driver from another. While separate source leasing raises the same kinds of state enforcement questions associated with single-source leasing, historically, NARUC has not complained of

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engaged in interchangeable business ventures, that is, one is a complete substitute for the other with the determining factor being the highest revenue potential. This simplistic approach demonstrates Petitioners' inability to perceive that the lessee of a driver and vehicle furnished by the same source must *itself* convert those factor inputs into carriage before it will be found to be conducting private carriage.

enforcement concerns in regard to separate source leasing. Moreover, NARUC's argument ignores the commercial realities of single-source leasing. Even though the Commission does not formally require a written lease, sound business practice mandates execution of a written lease to protect all parties concerned. Indeed, many states will require that copies of vehicle leases be filed with the state public utility commission and/or retained in the cab of the leased equipment.

B. THE ALLEGEDLY CONFLICTING COURT OF APPEALS' DECISIONS OF THE FIFTH AND ELEVENTH CIRCUITS ARE DISTINGUISHABLE ON THEIR FACTS

Knowing that an irreconciliable conflict between decisions of courts of appeals will enhance, if not ensure, Supreme Court review, Petitioners in Case No. 83-943 engage in a bit of creative analysis to manufacture a conflict between the Fifth and Eleventh Circuits. Apparently, Petitioner in Case No. 83-1030 ("Ryder") supports this conflict theory. However, judging from Ryder's superficial treatment of this point, one can only assume that it was unwilling to commit itself. NARUC either does not support the conflict theory or simply neglects it. In any event, ATA contends that the conflict exists between the Eleventh Circuit's decision in *Single-Source Leasing* and a recent decision rendered by the Fifth Circuit in *Central Forwarding, Inc. v. ICC*.[14] Respondents submit that no such conflicts exists and that the decisions are distinguishable on their facts.

In *Central Forwarding*, the Fifth Circuit concluded that the Commission lacked the statutory authority to regulate compensation paid by carriers to owner-operators. Specifically, the Fifth Circuit held that the Commission could not base its rulemaking authority to promulgate the regulation in question on the National Transportation Policy ("NTP"), 49 U.S.C. § 10101(a) (7).

Although acknowledging this Court's decision in *American Trucking Associations v. United States*,[15] wherein it was stated

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[14] 698 F.2d 1266 (1983).

[15] 344 U.S. 298 (1953).

that the ICC could regulate certain leasing practices between carriers and owner-operators despite the lack of any express delegation of power under the Interstate Commerce Act, the Fifth Circuit concluded that the decision did not grant *carte blanche* authority to the Commission over all leasing practices. Specifically, the Fifth Circuit concluded:

> The wording of the statute [NTP], the case law and the legislative history all point to the conclusion that the [NTP] . . . does not grant the ICC authority to regulate compensation paid by carriers to owner-operators.[16]

In light of the foregoing, certain Petitioners maintain that "the Fifth Circuit's decision respecting the reach of the NTP cannot be squared with the Eleventh Circuit's decision on the same matter."[17]

These decisions are distinguishable on their facts. In *Central Forwarding*, the Fifth Circuit concluded that the NTP did not give the Commission rulemaking authority to regulate compensation paid by carriers to owner-operators. The Fifth Circuit's inquiry into the scope of the NTP was to determine *whether it provided an independent basis for rule making authority*. The Fifth Circuit concluded that the NTP did not.[18] In short, *Central Forwarding* was an attempt by the Commission to employ the NTP as an independent foundation for rulemaking authority.

Conversely, in *Ryder Truck Lines*, the Commission asserted that its change in policy was consistent with the NTP. There was no attempt to employ the NTP as an independent source for its policy statement, as was the case in *Central Forwarding, supra*. As an expert administrative agency with respect to

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[16] 698 F.2d at 1281.

[17] Case No. 83-943, ATA's Pet. App. at 11.

[18] The inherent flaw in Petitioners' assertion is demonstrated by the following point, to wit: There is nothing in the Eleventh Circuit's decision from which one could reasonably conclude that it would have decided *Central Forwarding* any differently than the Fifth Circuit, or, on the other hand, that the Fifth Circuit would have reached a contrary decision in the single-source leasing case based on its decision in *Central Forwarding*.

transportation issues, the ICC possesses the necessary regulatory authority to promulgate a policy addressing the demarcation between for-hire and private carriage. In this respect the Eleventh Circuit was attempting to ascertain whether the policy statement was a reasonable exercise of the Commission's demonstrated regulatory authority.

The Eleventh Circuit decided that changes in the nature of the trucking industry, attendant reduced need for protection of regulated carriers from encroachment by private carriers, and policy changes focusing on ease of entry and increased competition in the transportation industry provided rational bases for the ICC's policy statement and established a more practical approach for defining unregulated private carriage.

At the heart of Petitioners' conflict theory is the often rejected notion that the NTP only applies to regulated carriage. Apparently, Petitioners believe that the Fifth Circuit's decision in *Central Forwarding* supports this proposition. Contrary to Petitioners' theory, the Fifth Circuit did not forbid the Commission from considering the effect of its rules on the unregulated sector; it only held that the NTP does not act as an independent source of rule-making authority. Indeed, Petitioners' theory is inconsistent with the Fifth Circuit's decision in *Mercury Motor Express Inc.*, which held that a measure initiated by the ICC to improve both private and regulated carriage was consistent with the NTP. In short, there is simply no real conflict between the opinions of the Fifth and Eleventh Circuits. Moreover, much of the language relied upon by Petitioners to support their conflict argument is dictum.

C. THE NEW POLICY STATEMENT IS CONSISTENT WITH THE VIEW ADOPTED IN THE *DRUM* DECISION THAT THE TEST FOR DISTINGUISHING PRIVATE FROM FOR-HIRE CARRIAGE IS AN EVOLVING STANDARD

To bolster their request for Supreme Court review, Petitioners, in unison, assert that there is a conflict between the Eleventh Circuit's decision in *Single-Source Leasing* and this Court's decision in *Drum*.[19] In fact, no conflict exists. Rather,

[19] 368 U.S. 370 (1962).

the asserted conflict is rooted in the Petitioners' inartful analysis of the *Drum* decision and their obvious desire to secure Supreme Court review.

In *Drum*, this Court upheld the Commission's findings that appellees who leased their motor vehicles in connection with their services as drivers were conducting for-hire carriage. The Commission concluded that the lessees were able to emancipate themselves, in significant measure, from the characteristic burdens of private carriage.

In essence, the Supreme Court was in complete agreement with the Commission with respect to the test established, the rationale underlying the test and the Commission's application of the test to the facts outlined in *Drum*. This court reiterated that *the demarcation between private and for-hire carriage is left to the Commission's expertise*, and that the *Drum* case "is a recent instance of the Commission's developing technique of decision."[20] In *Single-Source Leasing*, the Commission has sought to further redefine its test for private carriage.

ATA asserts that the "Eleventh Circuit misinterpreted *Drum* when it failed to recognize that an employment relationship is a fundamental burden a shipper must assume under the substance test. . . ." First, contrary to Petitioners' contention, the asserted employment relationship goes to the "control" inquiry–not the "substance" inquiry. More importantly, the Commission has always articulated the inquiry in terms of *control*–not employment. If the two are identical, as the Petitioners would have this Court believe, then why not simply articulate the test in terms of employment?[21] The inescapable

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[20] *Id.* at 374.

[21] If Petitioners' position were correct, then there would be absolutely no benefit in private carrier single-source leasing since in each case the private carrier would have to establish an employment relationship with the drivers. Thus, the normal incidents of employment would attach to the relationship. One of the benefits of leasing is to avoid the cost and other undesirable aspects of directly employing drivers. While it may be that the control requirements established by the Commission would invariably lead to a conclusion by the National Labor Relations Board that the shipper is, in fact, the employer, this is a far cry from holding that an employment relationship must exist.

conclusion is that it is the indicia of control which the Commission looks to in evaluating single-source leasing arrangements.

In accordance with the test adopted in *Single-Source Leasing*, the Commission will now focus on the elements of *control, responsibility, and performance of the key organizing and management functions of a transportation company*. Oftentimes, the Commission draws a parallel between the indicia of control which exist in a true employment context and the indicia of control existing in the particular case under review. *See Personnel Services, supra; Heavy Equipment Rental Co., Investigation*, 98 M.C.C. 365 (1964). It is probably the comparative use of the term, "true employment relationship" which has led the Petitioners to conclude that an employment relationship between the shipper and the equipment operator is essential. Their argument is misplaced; it is the indicia of control which are essential.

Nevertheless, assuming *arguendo* that the Commission had required, in its past decisions, as Petitioners would have us believe, that there be a valid employment relationship in all cases of single-source leasing and that the new policy test significantly alters that requirement, this would not invalidate the new test. Fatal to Petitioners' quest for review is this Court's acknowledgment in *Drum* that the demarcation between private and for-hire carriage is committed to the Commission's expertise and that any test established by the Commission is necessarily an evolving one. *Drum* is not and was never intended to be a limitation on the Commission's ability to adopt a new criterion for defining private carriage. If this is the case, and it is, then it is absurd to argue that the Eleventh Circuit's decision conflicts with *Drum*. In fact, the Commission has done nothing more than the Supreme Court in *Drum* stated the Commission has the authority to do.

NARUC argues that the Eleventh Circuit's decision conflicts with *Drum* inasmuch as the ICC must establish "practical and enforceable limitations upon private shippers." NARUC Pet. App. at 13. This disingenious argument is nothing more than NARUC's state enforcement argument with a different twist. Such a thinly disguised attempt to create a conflict is not

entitled to serious consideration and should be summarily dismissed.

Ryder does not raise a true conflict argument. Instead, it contends that the ICC was bound by *Drum* and that *Single-Source Leasing* rejects *Drum*. Ryder is in error on both points.

Petitioners labor under the misguided assumption that the ICC is bound by the policies of the past. Respondents maintain, however, that an administrative agency is not and should not be bound by the principle of *stare decisis* when confronted with significant changes in the industry which it regulates. *If the "Drum" decision makes anything clear, it is that the test fashioned by the Commission is an evolving one.*

The Commission's authority and obligation to reassess and revamp outmoded policy are not open to question. In *American Trucking Associations, Inc.* v. *Atchison, Topeka and Santa Fe Railway Co.*, 387 U.S. 397, 416 (1967), this Court concluded:

> [T]he Commission, faced with new developments or in light of reconsideration of the relevant facts and its mandate, may alter its past interpretation and overturn past administrative rulings and practice. . . . In fact, . . . this kind of flexibility and adaptability to changing needs and patterns of transportation is an essential part of the office of a regulatory agency. Regulatory agencies do not establish rules of conduct to last forever; they are supposed, within the limits of the law and of fair and prudent administration, to adapt their rules and practices to the Nation's needs in a volatile, changing economy. They are neither required nor supposed to regulate the present and the future within the inflexible limits of yesterday.

Judicial deference to the Commission's discretion in determining the need for change was evident in *American Trucking Associations, Inc.* v. *United States*, 602 F.2d 444 (D.C. Cir. 1979), wherein, the Court stated:

> In creating the ICC it was the "fond hope" of Congress that the Commission would "bring to . . . [its] work the expert's familiarity with industry conditions which members of the delegating legislatures cannot be expected to possess" and that "the Commission would exercise its expertise and interpret . . . in future times with an eye toward prevailing conditions in the transportation market."

Id. at 449. The Commission's duty to reassess outdated policy was more recently affirmed in *Mercury Motor Express, Inc.*, wherein the former Fifth Circuit declared:

> To imprison the Commission in a policy formulated more than forty years ago when the transportation industry was in its infancy would effectively thwart its proper enforcement of the National Transportation Policy. To the contrary, it has been directed to administer the Act in light of the nation's changing needs:

Id. at 319. Therefore, the response of the Commission in *Single-Source Leasing* to the ever-increasing need for energy efficiency, productivity and competition in the trucking industry was well within the scope of the Commission's authority.

On this point, the appellate court concluded, after review of all relevant portions of the record, "that the new policy is a rational response to the Commission's findings of changed circumstances." *Ryder, supra* at 1389.

CONCLUSION

On the basis of the foregoing, the Petitions for Writ of Certiorari should be denied.

Respectfully submitted,

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Nos. 83-943, 83-1030 and 83-1119

IN THE
Supreme Court of the United States
OCTOBER TERM, 1983

AMERICAN TRUCKING ASSOCIATIONS, INC., *et al.*, *Petitioners*,

v.

UNITED STATES OF AMERICA and
INTERSTATE COMMERCE COMMISSION

RYDER TRUCK LINES, INC., *Petitioner*,

v.

UNITED STATES OF AMERICA and
INTERSTATE COMMERCE COMMISSION

NATIONAL ASSOCIATION OF REGULATORY
UTILITY COMMISSIONERS, *Petitioner*,

v.

UNITED STATES OF AMERICA and
INTERSTATE COMMERCE COMMISSION

On Petitions For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF FOR RESPONDENT PRIVATE TRUCK COUNCIL OF AMERICA, INC. IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether a decision of the Interstate Commerce Commission reformulating the criteria for determining whether a particular motor carrier leasing arrangement constitutes regulated for-hire carriage or unregulated private carriage is consistent with the Motor Carrier Act of 1980 and is otherwise lawful and within its authority to make.

2. Whether the court of appeals' affirmance of the Commission's reliance on the National Transportation policy conflicts with a decision of the Fifth Circuit.

3. Whether the court of appeals correctly decided that the Commission's decision was not in conflict with a decision of this Court.

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OPINIONS BELOW

The opinion of the Interstate Commerce Commission (Pet. App. 1a-50a)[1] is reported at 132 M.C.C. 756 (1982). The opinion of the court of appeals (Pet. App. 59a-93a) is reported at 716 F.2d 1369 (1983).

[1] "Pet. App." refers to the appendix to the petition in No. 83-943.

JURISDICTION

The judgment of the court of appeals was entered on October 11, 1983. The petitions for a writ of certiorari in Nos. 83-943, 83-1030 and 83-1119 were filed on, respectively, December 7, 1983, December 22, 1983 and January 9, 1984. Petitioners invoke this Court's jurisdiction under 28 U.S.C. § 1254(1).

STATEMENT

Since the Motor Carrier Act of 1935, 49 Stat. 543-67, 49 U.S.C. § 10101 et seq., the Interstate Commerce Commission has had regulatory jurisdiction over motor carriers that provide interstate transportation of property and passengers "for compensation" (49 U.S.C. § 10102(12), (13))—commonly referred to as "for-hire" transportation. The Commission does not have jurisdiction, however, over "private" motor carriage—that is, transportation by a person or firm of its own property for its own purposes. 49 U.S.C. § 10102(14).

The statute contains no precise delineation of the factors and circumstances that distinguish "for-hire" transportation from "private" carriage, and the Commission has therefore been obliged to formulate various tests since 1935 to describe that distinction. The original Motor Carrier Act of 1935 had no definition of private carriage at all (Pet. App. 61a). In 1958 Congress amended the Act to provide some clarification of the distinction by enacting a provision (now codified in 49 U.S.C. § 10524), which states that transportation is private carriage exempt from the Commission's jurisdiction when

(1) the property is transported by a person engaged in a business other than transportation; and

(2) the transportation is within the scope of, and furthers a primary business (other than transportation) of the person.

Even that clarification did not serve to resolve the question whether transportation should be deemed "for-hire" or private in the innumerable different arrangements and circumstances in which it might arise (see Pet. App. 63a-64a and n.4). As the court of appeals observed, the Commission has articulated a number of different tests over the years, the latest of which petitioners have challenged in this case.

In this case, the Commission reexamined its prior views regarding an arrangement whereby a shipper leases a vehicle and the services of a driver from the same source—most commonly from persons known as "owner operators," who own and drive one or two vehicles. Generally, the Commission has not regarded a lessor of equipment only, or of driving services only, as providing "for-hire" transportation, but in 1940 the Commission concluded that single-source leasing should be presumed to constitute for-hire carriage. *H.B. Church Truck Service Co., Common Carrier Application*, 27 M.C.C. 191 (1940). The inquiry, the Commission said, was "who has the right to control, direct and dominate the performance of the service." 27 M.C.C. at 195. Accordingly, the Commission stated that the presumption of for-hire carriage could be rebutted by evidence that the shipper rather than the owner-operator had that right—"as for example, if the equipment were operated by the shipper's employee." (Id. at 196.)

In 1959 the Commission articulated an additional, "substance," test. In *Oklahoma Furniture Mfg. Co.*, 79 M.C.C. 403 (1959), the Commission found an arrangement to be "for-hire" transportation because, even

though it assumed that all the owner-operators providing the service were bona fide employees of the shipper, the financial arrangements between them and the shipper indicated that the transportation was "in substance" for-hire. These included the facts that the owner-operators paid all operating costs and trip expenses, guaranteed the shipper a fixed cost for the transportation, and assumed the risk of all losses. 79 M.C.C. at 412.

In *United States* v. *Drum*, 368 U.S. 370 (1962), this Court upheld the Commission's formulation of the *Oklahoma Furniture* test. Recognizing the imprecision of the statutory language, the Court described the essential concept of private carriage as follows (368 U.S. at 375-76):

> From the outset the Commission has correctly interpreted [the statutory definitions] as importing that a purported private carrier who hires the instrumentalities of transportation from another must—if he is not to utilize a licensed carrier—assume the characteristic burdens of the transportation business.

The Court then held that the Commission's resolution of the question in that case was within its administrative discretion and that the district court's contrary conclusions reflected "an unwarranted intrusion into the administrative domain" 368 U.S. at 386. Thus, the Court stated (368 U.S. at 375-76, 385):

> The problem is one of determining—by reference to the clear but broad remedial purpose of a regulatory statute committed to agency administration—the applicability to a narrow fact situation of imprecise definitional language which delineates the coverage of the measure.

* * *

> We think that [its] conclusions were well within the range of responsibility Congress assigned to the Commission.

In decisions after *Drum*, the Commission continued to apply the presumption of "for-hire" carriage adopted in *Church* and to use the "control" and "substance" formulations of the test employed in *Church* and *Oklahoma Furniture*. Whether particular arrangements met those standards, however, depended on the particular facts and circumstances of each case; as the court of appeals noted (Pet. App. 65a, n.6), one authority has identified as many as 14 different factors that the Commission considered in deciding whether given arrangements were "in substance" for-hire or private carriage.[2]

In the decision under review in this case, the Commission, after considering the written and oral comments of more than 200 persons, firms and associations, issued a policy statement in which it reexamined and reformulated the tests previously employed to distinguish for-hire from private carriage when equipment is leased to a private carrier. Pet. App. 1a-58a. Notwithstanding petitioners' claims, the Commission's basic analytic approach did not depart dramatically from prior decisions. Thus, it

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[2] Although the Commission applied the *Church* presumption to single-source leasing by shippers, it did not apply the same presumption with respect to single-source leasing by certificated, for-hire, motor carriers. That is, the Commission did not presume that an owner-operator who leased his services and equipment to a regulated carrier was engaged in "for-hire" transportation requiring him to obtain his own certificate from the Commission; in fact, the Commission's regulations specifically provide for such leasing (49 C.F.R. §§ 1057.11 and 1057.12.) Consequently, until the Commission adopted the decision under review, its decisions and regulations forced most uncertificated owner-operators to operate only under the aegis of regulated carriers.

stated at the outset: "We recognize the continued need to maintain a workable distinction between for-hire and private carriage." (Pet. App. 2a. See also Pet. App. 3a) Further, the Commission will continue to focus "on the control exercised [by the shipper] over a lessor" (*ibid.*). The policy statement also makes clear that the Commission will continue to examine the "substance" of the arrangement. Thus, it stated (*id.* at 27a; emphasis supplied):

> The crucial element, we believe, is precisely what services a lessor holds out to perform. If he holds out what is *in substance* a complete transportation service for compensation, then he is acting as a common or contract carrier . . ."

And later (Pet. App. 31a; emphasis supplied):

> We will not restrict our inquiry to the formal recitals of the lease agreement, but will—as in past—examine all surrounding facts and circumstances and the actual conduct of operations under the lease to ascertain if the *true substance of the arrangement* is in accord with that recited in the formal agreement.

The principal change the Commission effected was simply to eliminate the previous *presumption* that single-source leasing was for-hire transportation—a presumption the Commission found in practice to be "virtually irrebuttable." (Pet. App. 4a). The Commission concluded that the presumption was no longer warranted in view of dramatic changes in the motor carrier industry since 1935 and in view of the substantial changes in legislative purpose and policy reflected in the Motor Carrier Act of 1980, Pub. L. 96-296, 94 Stat. 793 (1980) (Pet. App. 20a-26a). In place of the former presumption against for-hire carriage, the Commission stated it would examine a number of factors to determine whether the shipper was assuming what this Court in *Drum* termed the "characteristic burdens of transportation." (Pet. App. 26a-34a). It further

identified six characteristics of a lease arrangement which must be met at a minimum to be deemed private carriage, including the lessee's maintenance of liability insurance, the lessee's bearing the risk of loss to cargo, and a minimum lease term of 30 days. (Pet. App. 34a-37a).[3] As noted, however, the Commission stated that it would continue to examine all the surrounding facts and circumstances in each case to determine whether the "true substance of the arrangement" (Pet. App. 31a) was private carriage.

The court of appeals affirmed (Pet. App. 59a-93a). It rejected petitioners' contentions that this Court's decision in *Drum* foreclosed the Commission's reformulation of the for-hire/private carriage distinction in this case and that it was inconsistent with the Motor Carrier Act of 1980. On the contrary, after reviewing the legislative history of that Act and noting "the fundamental change" effected by it (Pet. App. 90a, n.21), the court concluded that "the new policy is a rational response to the Commission's findings of changed circumstances" (Pet. App. 91a).

ARGUMENT

1. Contrary to petitioners' claims, this case presents no broad question of general importance or significant new interpretation of law, and there is no conflict among the circuits or other reason that would warrant this Court's review. On the contrary, what the case involves is merely the Interstate Commerce Commission's reformulation of the distinction, which the statute states in only general terms, between for-hire and private trans-

[3] In addition, the Commission listed ten other factors it viewed as being relevant to whether a particular operation was for-hire or private carriage. (Pet. App. 37a-60a)

portation and the elimination of a presumption it had previously employed regarding single-source lease arrangements. This reformulation involved no significant change in the Commission's view of the controlling principle but simply reflects its decision to determine the question on a case-by-case basis in light of the relevant factors rather than by application of the presumption previously used.

Moreover, although petitioners speculate that the Commission's administration of the new test will have a significant and adverse impact on the motor carrier industry, the judgment of the Commission—the expert agency that Congress established to make such assessments—is to the contrary. Thus after reviewing the present circumstances of both the regulated and the private sectors of the motor carrier industry, as well as the reduced barriers to entry into the regulated industry effected by the 1980 Motor Carrier Act, the Commission concluded (Pet. App. 21b):

> We do not believe that any action taken here will have a major effect on the overall balance between the regulated and private sectors of the industry.

On review, the court of appeals unanimously concluded that this assessment was reasonable (Pet. App. 90a). Beyond their own speculation, petitioners have offered no basis for this Court's reaching a different conclusion.

In any event, as the court of appeals also noted (Pet. App. 90a), this case is not an appropriate case to review petitioners' speculations about the possible impact of the Commission's application of its new approach. Any abuses of that approach or adverse consequences that will assertedly result from it may be reviewed in the context of specific complaint or enforcement proceedings, as this

Court did in the *Drum* case on which petitioners themselves rely.[4]

2. Furthermore, the court of appeals' decision was plainly correct, and petitioners' arguments to the contrary are without merit.

a. Petitioners American Trucking Associations, Inc., et al. ("ATA") and Ryder Truck Lines, Inc. ("Ryder") contend[5] that the Commission's decision is contrary to the Motor Carrier Act of 1980 because that Act did not change the statutory definitions of "motor common carrier," "motor contract carrier" and "motor private carrier." This argument is insubstantial. The fact that the 1980 Act did not change the definitions plainly does not preclude the Commission from reconsidering and reformulating the tests previously employed for distinguishing one type of carrier from another. Indeed, ATA *admits* (Pet. No. 83-943 at 13) that "[b]ecause [the statutory definitions] are imprecise, the Commission is permitted some discretion in forming a workable test . . . ." The Commission's authority to adopt a new formulation is not only admitted by ATA but is also clear from this Court's decisions. As the Court stated in *American Trucking Associations, Inc.* v. *Atchison, T. & S.F. Ry. Co.*, 387 U.S. 379, 416 (1967):

> [T]he Commission, faced with new developments or in light of reconsideration of the relevant facts and its mandate, may alter its past interpretations and over-

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[4] Moreover, although petitioner American Trucking Associations, Inc. cites *Drum* as an example of a case this Court found sufficiently important to review on certiorari (Pet. No. 83-943 at 5), it overlooks that *Drum* was not reviewed on certiorari but was a direct appeal from a three judge court decision under 28 U.S.C. § 1253.

[5] Pet. No. 83-943 at 6-10; Pet. No. 83-1030 at 16-18.

> turn past administrative rulings and practices . . . . Regulatory agencies do not establish rules of conduct to last forever; they are supposed, within the limits of the law and of fair and prudent administration, to adapt their rules and practices to the Nation's needs in a volatile, changing economy. They are neither required nor supposed to regulate the present and the future within the inflexible limits of yesterday.

Furthermore, the Commission correctly found substantial affirmative support in the policies and provisions of the 1980 Act for its decision in this case. In particular, that Act significantly reduced the regulatory barriers to obtaining for-hire authority from the Commission. As the Commission noted, this change reflected Congress' lessened concern with protecting the regulated industry from new competition, and also reduced the likelihood that persons would use the form of private carriage as a subterfuge to evade regulation (Pet. App. 24a-25a).[6] Indeed, the decision under review is consistent in approach with many others in recent years, both before and after the 1980 Motor Carrier Act, which have reduced the

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[6] ATA and Ryder argue, in essence, that because the 1980 Act did not completely deregulate the motor carrier industry, it reflects some residual protectionist purposes that the Commission's decision here undermines (Pet. No. 83-943 at 6-9; Pet. No. 83-1030 at 15-18). In view of what the court of appeals correctly noted as the "fundamental change" effected by the 1980 Act (Pet. App. 90a, n.21), this argument is like describing the doughnut in terms of the hole. As the court of appeals for the Fifth Circuit recently stated, rejecting the same argument in another case: "Notwithstanding that Congress did not completely deregulate the trucking industry, the 1980 amendments unquestionably embody a strong new deregulatory philosophy." *American Trucking Associations, Inc.* v. *ICC*, 5th Cir. Nos. 81-4389, 83-4039 (January 20, 1984) (slip op. at 1674).

regulatory strictures on the motor carrier industry and opened it to greater competition.[7]

In addition, petitioners overlook the fact that the Commission also based its decision on fundamental changes that have occurred in the motor carrier industry, which today "bears little resemblance to the precarious, fragmented, and unstable industry of the mid-1930's." (Pet. App. 20a). Petitioners do not challenge this basis of the Commission's decision, although the court of appeals found it to "provide[] a rational basis for reconsidering and rejecting the presumptions announced in *Church* and *Oklahoma Furniture*." (Pet. App. 90a.)

b. Petitioners ATA and Ryder also contend[8] that the decision of the court of appeals conflicts with a decision of the Fifth Circuit because the Commission found support for its decision in, among other things, the 1980 amendments to the National Transportation Policy (set forth in 49 U.S.C. § 10101) which stress the promotion of "competitive and efficient transportation services." This strained effort to find a conflict among the circuits is wholly without merit.

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[7] See, *e.g.*, *American Trucking Associations, Inc.* v. *ICC*, 5th Cir. Nos. 81-4389, 83-4039 (January 20, 1984) (affirming ICC decision removing constraints on railroad entry into motor carrier industry); *Mercury Motor Express, Inc.* v. *United States*, 648 F.2d 315 (5th Cir. 1981) (affirming ICC decision allowing private carriers to obtain for-hire authority); *Assure Competitive Transportation, Inc.* v. *United States*, 635 F.2d 1301 (7th Cir. 1980) (affirming ICC policy statement reducing burdens on applicants for new certificates to provide greater competition); *Regular Common Carrier Conference of the American Trucking Associations, Inc.* v. *United States*, 628 F.2d 248 (D.C. Cir. 1980) (affirming ICC decision removing presumptions limiting contract carrier operations);

[8] Pet. No. 83-943 at 10-13; Pet. No. 83-1030 at 14-15.

First, *Central Forwarding, Inc.* v. *ICC*, 698 F.2d 1266 (5th Cir. 1983), the allegedly conflicting decision, involved a completely different issue and has no relevance to this case. In *Central Forwarding*, the Commission promulgated rules regarding a matter over which it had no jurisdiction—rules mandating the levels of compensation regulated carriers were required to pay owner-operators—and the court rejected the Commission's argument that the National Transportation Policy alone gave it authority to promulgate the rules. Here there can be no serious contention that the Commission lacks the authority to state, and from time to time re-state, what distinguishes for-hire from private carriage; indeed, as noted, petitioner ATA admits the Commission has that authority. See also *American Trucking Associations, Inc.* v. *Atchison T & S.F. Ry, supra.* In exercising that authority, it was clearly proper for the Commission to consider—among other matters—the National Transportation Policy and changes to it; indeed, it would have been improper for it not to.

Furthermore, a recent decision of the Fifth Circuit should lay to rest any suggestion that that court believes the Commission may not rely on the National Transportation Policy in its policy statements. In *American Trucking Associations, Inc.* v. *ICC*, 5th Cir. Nos. 81-4389, 83-4039, that court upheld the Commission's decision to abolish a long-standing doctrine that had restricted railroad entry into the motor carrier industry, and it relied specifically on 1980 amendments to the National Transportation policy in doing so (slip op. at 1676).

c. The court of appeals correctly rejected petitioners' further arguments[9] that the Commission's deci-

[9] Pet. No. 83-943 at 13-17; Pet. No. 83-1030 at 11-12; Pet. No. 83-1119 at 13-17.

sion conflicts with this Court's decision in *United States* v. *Drum*, *supra*. The opinion in *Drum* made quite clear that this Court's decision rested on its deference to the Commission's *discretion* to fashion workable distinctions in administering an imprecise statute, and did not intend to lock the agency forever into the particular formulation upheld in that case. See 368 U.S. at 375-376, 385-386 and pages 4-5 *supra*. Certainly nothing in this Court's decision remotely suggested that the statute required the Commission to presume from one factor alone—a single-source lease—that transportation is for hire. If anything, the thrust of the opinion is to the contrary, since it stated (368 U.S. at 384): "We deal in totalities; indicia are instruments of decisions, not touchstones."[10]

Furthermore, as noted in the Statement, *supra*, the Commission's decision here does not reject, but in fact reaffirms, the basic principles set forth in *Drum*, *Church* and *Oklahoma Furniture*. Thus, the Commission reaffirmed the "need to maintain a workable distinction between for-hire and private carriage" (Pet. App. 2a), and it made clear that it will continue to focus heavily on the shipper's control of the transportation service and will in all cases examine whether the transportation is in "substance" for hire. Petitioners' contention that the Commis-

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[10] Moreover, in upholding the Commission's discretion in that case, the Court relied on the principal policy of the 1935 Act, which reflected "congressional concern over diversions of traffic which may harm existing carriers . . . ." 368 U.S. at 375. As outlined by the Commission and the court of appeals here (Pet. App. 23a-26a, 82a-90a), the 1980 Motor Carrier Act reflected a new congressional policy favoring substantially greater competition. *Drum* itself therefore suggests the appropriateness of the Commission's reexamining its *Oklahoma Furniture* decision in light of the change in legislative policy.

sion has adopted a significantly different "test" is simply unfounded; what they are really complaining about is the Commission's decision no longer to presume automatically that transportation by an owner-operator who is not on the private carrier's payroll as an "employee" is for-hire transportation.

d. Petitioner National Association of Regulatory Utility Commissioners ("NARUC"), which did not file comments with the Commission in this proceeding, now argues that the Commission's decision will significantly impair the ability of the States to enforce the licensing provisions of the Interstate Commerce Act. The judgment of the commission with the principal responsibility for enforcing those provisions, however, was that its decision would not lead to substantial evasions because, among other things, the reduced "barriers to entry of new carriers into the regulated industry [under the 1980 Act] has also reduced any incentives such carriers may have to devise subterfuges to remain outside the reach of regulation." (Pet. App. 25a.) Furthermore, as the court of appeals noted (Pet. App. 91a), the Commission "will continue to ferret out for-hire schemes which purport to be private carriage."

Although NARUC disputes that judgment for various reasons, it offers no justification for asking *this* Court to address NARUC's concerns when they were evidently not deemed sufficiently important by it to present to the agency in the first instance.

In any event, NARUC's claims are unpersuasive. Thus, NARUC claims that officers checking trucks at road check points will have difficulty under the Commission's decision determining whether a given driver is engaged in bona fide private carriage. Whether this determination was substantially easier before the Com-

mission's decision is questionable, however, in view of the fact, as the court of appeals noted, that the "control" and "substance" tests as they were applied in *Church, Oklahoma Furniture* and other decisions took into account as many as 14 different factors. Moreover, it is difficult to see why there should be any substantial difficulty in this regard, in light of the fact, as NARUC itself asserts, that 27 states presently require interstate carriers exempt from ICC jurisdiction, *including private carriers*, to "register their operations [with the State], to maintain adequate levels of insurance, and to designate local process agents." Pet. No. 83-1119 at 7, n.6. This clearly indicates that the supposed problems that NARUC has pointed out regarding checking credentials, maintaining proper insurance, etc., are ones that can be remedied by the States themselves.[11]

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted,

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February 6, 1984

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[11] NARUC's concerns about the use and abuse of oral leases (Pet. No. 83-1119 at 10-11) are fanciful. It is simply implausible to suppose that it would be more than the rarest of occasions in which private carriers would entrust their property to owner-operators or other lessors solely on the basis of some oral arrangement.

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REPLY BRIEF FOR THE PETITIONERS IN NOS. 83-943 AND 83-1030

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REPLY BRIEF FOR THE PETITIONERS IN NOS. 83-943 AND 83-1030

Pursuant to Rule 22.5 of the Supreme Court Rules, Petitioners submit this reply brief to the arguments first raised by the government.[1]

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[1] The separate briefs in opposition submitted by respondents Private Carrier Conference, Inc., *et al.*, Private Truck Council of

REPLY ARGUMENT

Petitioners previously have demonstrated a conflict between the challenged decision of the Eleventh Circuit and the decision of the Fifth Circuit in *Central Forwarding, Inc.* v. *ICC*[2] (ATA Pet. 10-13). Petitioners explained how, in contrast to the Fifth Circuit's interpretation of the National Transportation Policy (NTP), 49 U.S.C. § 10101, the Eleventh Circuit ascribes to the NTP the status of independent and unfettered statutory authority. Not only did the Eleventh Circuit find the NTP to be the direct and only statutory source for the ICC's single-source lease decision in the light of purported changed circumstances,[3] but it upholds the ICC's reliance upon that policy as a mandate to foster exempt carrier competition without concern for the adverse impact of exempt carrier competition upon regulated carriers. Petitioners have further demonstrated that the Eleventh Circuit's construction of the NTP not only is contrary to the plain language of the statute,[4] but also renders superfluous the specific remedial provisions Congress enacted in the Motor Carrier Act of 1980 (MCA) to address the specific problems of exempt private carriers and owner-operators (ATA Pet. 8-9). Such a result was expressly condemned by the Fifth Circuit in *Central Forwarding* (ATA Pet. 11).

In response, the government argues that the recent Fifth Circuit decision in *American Trucking Associations,*

America, Inc., and the National Industrial Transportation League do not raise any arguments which are different from the government. Moreover, Petitioners initial petitions adequately address and refute the arguments they present.

[2] 698 F.2d 1266 (5th Cir. 1983).

[3] ATA App. 81a-98a. It is noteworthy that the Eleventh Circuit characterized as "not overwhelming" the ICC's evidence of changed circumstances (ATA App. 86a).

[4] By its terms, the National Transportation Policy applies to "modes of transportation subject to this subtitle," i.e., regulated carriers, 49 U.S.C. § 10101.

Inc. v. *ICC*,[5] rendered subsequent to the filing by Petitioners of their petitions in this Court, supports the Eleventh Circuit's reliance upon the NTP as the sole statutory provision permitting the ICC to enhance the business opportunities of exempt entities to the direct disadvantage of, and with no concern for, regulated motor carriers (Fed. Br. 16 n.14). The government's reliance on this case is mistaken.

The facts in the *ATA* case clearly are distinguishable. In that proceeding the ICC changed the proof standards to be met by a rail carrier or rail-affiliated motor carrier seeking to obtain from the ICC unrestricted motor carrier operating authority. Applicants meeting the revised standard then become regulated motor carriers and compete under the same regulatory framework as existing regulated motor carriers, including compliance with the comprehensive leasing regulations codified at 49 C.F.R. Part 1057. On these facts, the Fifth Circuit held that the NTP, when read in conjunction with the eased licensing standards enacted in section 5 of the MCA, 49 U.S.C. § 10922(b)(1), provided a rational basis for the ICC's decision to no longer require railroads to demonstrate "special circumstances" as a prerequisite to obtaining unrestricted operating authority.

In contrast, the Eleventh Circuit relied upon the NTP as the sole statutory provision authorizing the ICC's decision, even though it apparently agreed with Petitioners that the single-source leasing decision is in conflict with the Congressional policy of encouraging unregulated entities to obtain ICC operating authority, 49 U.S.C. § 10922 (ATA App. 87a). Furthermore, unlike such rail-affiliated motor carriers, owner-operators, commercial lessors and shippers operating under the ICC's single-source leasing decision will not be entering the fray of the competition in the trucking industry on the same grounds as regulated motor carriers, *cf.* 722 F.2d at 1252. Instead, as

[5] 722 F.2d 1243 (5th Cir. 1984).

wholly-exempted transportation entities they will serve only their own self interests without regard to the responsibilities imposed upon the regulated transportation system designed by Congress to meet the transport needs of the United States, including the U.S. Postal Service and the national defense.

For similar reasons, the government's reliance upon the decision of the Fifth Circuit in *Mercury Motor Express, Inc.* v. *United States*,[6] which found a rational basis for an ICC policy change permitting private carriers to obtain regulated motor carrier authority, is also misplaced. *Mercury* encourages exempt private carriers to enter into the regulated motor carrier industry, and thus furthers the regulated system by enhancing competition among similarly situated regulated carriers. In contrast, the Eleventh Circuit's decision encourages shippers, owner-operators and commercial lessors to enter into transportation arrangements to be conducted entirely outside the scope of the ICC's regulation.

Similarly, in the *Global Van Lines* case,[7] the court considered whether the ICC could, consistent with the NTP, require regulated motor carriers to pay interest on the funds of owner-operators held in carrier escrow accounts. The exercise of this power by the ICC was upheld by the court because the aim of the rules was to prevent conditions which may frustrate the success of regulation undertaken by Congress.[8] Here, however, the new policy favoring exempt carriage is facially inconsistent with the regulatory system. The new policy favors exempt carriage over regulated carriage and will result inevitably in the economic weakening of the regulated carriers upon which the vast majority of the shippers rely, especially the small shipper, to get their goods to market. Thus, although the

[6] 648 F.2d 315 (5th Cir. 1981) (Fed. Br. 17-18 n.15).

[7] Global Van Lines, Inc. v. ICC, 627 F.2d 546 (D.C. Cir. 1980) (Fed. Br. 17).

[8] *Id.* at 550-551.

court in *Global* did consider the question of whether the financial viability of owner-operators is a valid concern of the NTP, it considered it only in the context of owner-operators leased to regulated carriers and the effect of those relationships upon the success of the regulations. As is demonstrated by *Central Forwarding*, the ICC's desire to enhance the economic welfare of owner-operators does not in and of itself give the ICC *carte blanche* authority to favor exempt carriage at the expense of the regulated system.

No other court has sanctioned the direct application of the NTP to unregulated transportation without regard to the effect of the action upon the regulated system. The broad and virtually unencumbered application given the NTP by the Eleventh Circuit's decision, therefore, manifests clearly the significant national importance of this case.

Next, Petitioners wish to bring to the Court's attention an error in the government's brief. On page 13, the government argues that the ICC's new test is consistent with this Court's decision in *Drum*,[9] stating as follows:

> Although those arrangements that comply with the Commission's six minimum criteria will now create a presumption in favor of *for-hire carriage*, the lease arrangements remain, as always, subject to Commission scrutiny in the context of particular cases (emphasis added).

To the contrary, when a leasing arrangement meets the ICC's six minimum criteria, which are fraught with exceptions,[10] the presumption will be that the transportation is unregulated private carriage.

The presumption involved in *Drum* favored regulated for-hire carriage and was appropriate because it furthered the objectives of the scheme of economic regula-

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[9] United States v. Drum, 368 U.S. 370 (1962).

[10] NARUC Pet. 11-12; Ryder Pet. 10-11.

tion of trucking.[11] Here the newly created presumption in favor of exempt carriage is directly contrary to that scheme. As pointed out in *Drum*, the goal of the regulation of motor carrier entry and rates ". . . is to assure that shippers generally will be provided a healthy system of motor carriage to which they may resort to get their goods to market." [12] That goal was not changed by the MCA. Section 3 of the MCA continues to stress the importance to the national economy and the national defense of a safe, sound, competitive, and fuel efficient *regulated* motor carrier system.[13] In the MCA, Congress simply fine-tuned that regulatory structure and then admonished the Commission "to stay within the powers specifically vested in it by the revised law." [14] Significantly, when enacting the MCA Congress specifically *rejected* an ICC request that it be granted broad general exemption powers similar to those given to the Commission in the revised legislation governing railroad transportation.[15] Thus, the creation of a presumption in favor of exempt transportation is not only inconsistent with *Drum*, but flies in the face of the Congressional intent in enacting the MCA.

Finally, the government urges the Court to ignore the Eleventh Circuit's decision in favor of future judicial review of the application of the ICC's new policy in the context of specific compliant or enforcement proceedings. This argument is specious.

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[11] 368 U.S. at 374-375.

[12] *Id.* Exempt private carriers, however, haul only their own goods and are not available to perform transportation for "shippers generally."

[13] H.R. Rep. No. 96-1069, 96th Cong., 2d Sess. 10 (1980).

[14] *Id.* at 11.

[15] *See* To Amend Title 49 of the United States Code to Eliminate Unnecessary Regulation of Motor Carriers of Property, and for Other Purposes: Hearings on S. 2245 Before the Committee on Commerce, Science and Transportation, United States Senate, 96th Cong., 2d Sess. 1500 (1980) (Statement of Darius W. Gaskins, Jr., Chairman, Interstate Commerce Commission).

This case involves principles having widespread public importance. Through a combintaion of a presumption in favor of exempt carriage and vague standards, the challenged ICC policy as a practical matter destroys any enforceable line between regulated and exempt activities. Only four years ago, Congress undertook a major fine-tuning of federal motor carrier regulation. It preserved the basic distinction between for-hire and private carriage. If the decision of the Eleventh Circuit becomes effective, that distinction will immediately be obliterated and the Congressional policy frustrated. In these circumstances, review is appropriate now.

CONCLUSION

Wherefore, Petitioners respectfully request that their Petitions for a Writ of Certiorari be granted.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

NATIONAL ASSOCIATION OF
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v.

UNITED STATES OF AMERICA AND
INTERSTATE COMMERCE COMMISSION,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

---

REPLY BRIEF OF PETITIONER

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REPLY BRIEF OF PETITIONER

Pursuant to Rule 22.5 of the Supreme Court Rules, the National Association of Regulatory Utility Commissioners (NARUC), petitioner herein, hereby submits its brief in reply to arguments presented by the federal respondents in opposition to the NARUC's petition for a writ of certiorari.[1]

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[1] Since the arguments raised by respondents Private Truck Council of America, Inc., and Private Carrier Conference, Inc. *et al.* in opposition to the NARUC's petition are similar to those presented by the federal respondents, we will reply herein primarily to the federal brief in opposition.

ARGUMENT

Petitioner NARUC, in presenting the reasons why its petition for writ of certiorari should be granted, stressed the crucial importance of this case to the motor carrier enforcement programs of the several States. If left undisturbed, the decision of the Eleventh Circuit affirming the new "policy statement" of the Interstate Commerce Commission (ICC or the Commission) will render such enforcement efforts extremely difficult, if not impossible, for State enforcement agencies to perform because the Commission's decision effectively destroys the practical distinction between for-hire and private carriage upon which State motor carrier enforcement is based. (NARUC Pet. 10-13).

In response, the federal respondents criticize the NARUC's argument that the Commission's new single-source leasing policy unlawfully blurs the legal distinction between private and for-hire carriage as "unfounded", based upon "the exaggerated nature of NARUC's fears". (Fed. Br. 14-15).[2] In effect, these parties argue that the NARUC's arguments are premature, and that therefore, the Court should not now be concerned whether, in the words of *Drum*,[3] the ICC's policy "impose[s] practical limitations upon unregulated competition . . . in a manner which transcends the merely formal". 368 U.S. at 375. In their request that this Court await "actual enforcement cases" to determine if "the new policy will work in practice" (Fed. Br. 15), the federal respondents downplay the sweeping nature of the ICC policy statement, as well as ignore this Court's holding in *Drum*.

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[2] Similarly, respondent Private Truck Council of America, Inc. characterizes the NARUC's concerns as "fanciful". (PTCA Br. 15, n. 11).

[3] *United States v. Drum*, 368 U.S. 370 (1962).

A. Enforcement of the ICC's Single Source Leasing Policy

In its petition, the NARUC argued that the ICC's failure to require written single source leases would fundamentally frustrate State motor carrier enforcement because a State enforcement officer would not necessarily be provided with written evidence that the driver of a leased vehicle is entitled to the presumption [4] of private carriage for complying with the ICC's "sample lease language." (NARUC Pet. 11-13). We do not intend to repeat the arguments contained in our petition on this point, except to note that in our petition, we never argued that "oral single source leases will automatically raise the presumption of legitimate private carriage" (Fed. Br. 14). Rather, we argued that by the terms of the Commission's policy, a carrier is entitled to the presumption of private carriage, whether or not a written lease exists, as long as the six minimum criteria are present. Since the ICC policy statement places the burden of rebutting the presumption of private carriage upon, *inter alia*, State enforcement officers, *whether or not a written lease exists*, the arguments of the federal respondents that the NARUC's fears are "exaggerated" clearly misstates the ICC's policy.

The federal respondents concede as much when they state that "it would be virtually impossible to make such a showing [compliance with the six leasing criteria] at a road check without a written lease." (Fed. Br. 15) Yet, by its terms, the ICC's policy statement does not

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[4] The federal respondents appear confused concerning the presumption created through compliance with the ICC's six minimum lease criteria. By the terms of the policy statement, compliance with these criteria "raises a rebuttable presumption of private carriage." NARUC App. 57b. In their brief, however, federal respondents assert that compliance with the minimum criteria "will now create a presumption in favor of for-hire carriage." (Fed. Br. 18). Presumably, the presumption in favor of private carriage is correct.

permit a State officer to rely on the absence of a written lease to rebut a driver's claim that the six minimum criteria are present. Indeed, nowhere in the policy statement does the ICC state that failure to provide the "best evidence of the minimum requirements" (a written lease) rebuts this presumption. (NARUC App. 37b-38b). Therefore, the ICC's policy statement is not flawed because "it would require state enforcement authorities to prove violations of law" (Fed. Br. 14); rather, it is flawed because, in the absence of a written lease requirement, the new policy makes it "virtually impossible" for State officers to prove such violations.

A recent action by the ICC in which the Commission *has* required "truck drivers to prove that they are *not* law breakers" (Fed. Br. 14, emphasis in original) makes this flaw apparent. On March 14, 1984, in Ex Parte No. MC-43 (Sub-12), *Leasing Rules Modifications*, 49 Fed. Reg. 9570-9571 (March 14, 1984), the Commission issued final regulations which, *inter alia*, allow private carriers to trip lease their equipment and drivers to for-hire carriers. In those regulations, which are set out in the margin,[5] the Commission quite forcefully requires

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[5] 49 U.S.C. sec. 1057.22 Exemption for private carrier trip leasing and trip leasing between authorized carriers.

Regardless of the leasing regulations set forth in this part, an authorized carrier may lease equipment to or from another authorized carrier, or a private carrier may lease equipment to an authorized carrier under the following conditions:

(a) The identification of equipment requirements in sec. 1057.11(c) must be complied with;

(b) The lessor must own the equipment or hold it under a lease of 30 days or more;

(c) There must be a written agreement between the authorized carriers or between the private carrier and authorized carrier, as the case may be, concerning the equipment as follows:

(1) It must be signed by the parties or their authorized representatives.

(2) It must provide that control and responsibility for the operation of the equipment shall be of the lessee from the time

that drivers operating under such trip leases be able to prove lawful motor carriage: such leases must be in writing, and a copy of the agreement "must be carried in the equipment." 49 C.F.R. sec. 1057.22(c). A failure to comply with these requirements constitutes a violation of the Commission's regulations and a finding of unlawful carriage. The contrast between these rules and the Commission's single source leasing policy could not be starker. Clearly, the Commission knows how to write an enforceable leasing rule applicable to for-hire carriage. In its single source leasing statement, it has declined to adopt such an enforceable policy for private carriage.

B. The Requirements of *Drum*

Despite the obvious infirmities contained within the ICC's single source leasing policy, the federal defendants assert that the question of the enforceability of the policy should await "actual enforcement cases" before being judged. (Fed. Br. 15). We submit that this request should be rejected for the basic reasons described in our petition: the ICC's single-source leasing policy fails to comply with the holding of *Drum*, *supra*, that the legal distinction between private and for-hire carriage "be interpreted in a manner which transcends the merely formal." 368 U.S. at 375 (NARUC Pet. 13-17). In essence, *Drum* stands for the proposition that the dis-

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possession is taken by the lessee and the receipt required under sec. 1057.11(b) is given to the lessor until: (i) possession of the equipment is returned to the lessor and the receipt required under sec. 1057.11(b) is received by the authorized carrier, or (ii) in the event that the agreement is between authorized carriers, possession of the equipment is returned to the lessor or given to another authorized carrier in an interchange of equipment.

(3) A copy of the agreement must be carried in the equipment while it is in the possession of the lessee.

Sec. 1057.42 Lease of equipment by regulated carriers.

Authorized carriers may lease equipment and drivers from private carriers for periods of less than 30 days, in the manner set forth in 49 C.F.R. 1057.22.

tinction between private and for-hire carriage must be as a practical matter both workable and enforceable. As we have shown, the ICC's policy statement hardly qualifies in any real sense as practical guidelines for the enforcement of the heretofore "bright line" between these two types of carriage.[6] Therefore, we respectfully submit that there is no need to await "actual enforcement cases" given the inherent flaws in the new leasing policy. Indeed, this Court should review this policy now, before it takes effect, in order to avoid the chaotic enforcement of federal law which the Commission's decision portends.

CONCLUSION

For all of the reasons set forth in its petition and herein, the NARUC prays that a writ of certiorari be issued to the United States Court of Appeals for the Eleventh Circuit.

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[6] The federal respondents appear to concede as much when they note that "it would be virtually impossible to make such a showing [of lawful private carriage] at a road check without a written lease" (Fed. Br. at 15) in light of the failure of the policy statement to require such documentation.